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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C.M. UBERMAN ENTERPRISES, INC. et al.,
Petitioners,

v.

HISTORIC FIGURES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court should enforce a purchaser's promise to make periodic payments stretching into the future, on the ground that the promise standing alone is not illegal, without even hearing the defense that the promise is part of an illegal tying arrangement that requires the purchaser to pay an unlawfully high purchase price.

2. Whether an antitrust challenge to an illegal tying arrangement is barred by the statute of limitations, on the ground that the arrangement was entered into and the tied product delivered more than four years earlier, where within the statutory period the seller has enforced the agreement and required the buyer to pay an unlawfully high price.*

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* The parties in the court of appeals were as follows: Appellants were Williamsburg Wax Museum, Inc., National Civil War Wax Museum, Inc., National Souvenir Center, Inc., and Historical Reviews, Inc., who are petitioners herein and were plaintiffs and counterclaim-defendants in the district court; appellees were Historic Figures, Inc., National Historical Museum, Inc., Lynch Display Corporation, and Earl W. Dorfman, who are respondents herein and were defendants and counterclaim-plaintiffs in the district court.

After the filing of this action, petitioner National Souvenir Center, Inc. changed its name to C.M. Uberman Enterprises, Inc. and petitioners Williamsburg Wax Museum, Inc. and National Civil War Wax Museum, Inc. were merged into C.M. Uberman Enterprises, Inc. Historical Reviews, Inc. remains a separate, but commonly owned, corporation.

Respondents Historic Figures, Inc. and National Historical Museum, Inc. are subsidiaries of the Forge Company. Earl Dorfman is Vice President and principal shareholder of Lynch Display Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. THE COURT OF APPEALS' DECISION NARROWS THE ILLEGALITY DEFENSE IN TWO RESPECTS, BOTH OF WHICH CONFLICT WITH DECISIONS OF THIS COURT AND RAISE IMPORTANT QUESTIONS OF FEDERAL LAW AND POLICY	5
A. The Court Of Appeals' Decision Ignores This Court's Long-Standing Prohibition Against Judicial Enforcement Of Promises That Were Extracted In Violation Of The Antitrust Laws	7
B. The Court Of Appeals' Decision Permits Courts To Enforce Illegal Agreements By Substituting Their Concept Of Public Policy For Policies Embodied In Federal Statutes In Contravention Of This Court's Decision in *Mullins*	13
II. THE COURT OF APPEALS DECISION ON THE STATUTE OF LIMITATIONS ISSUE CONFLICTS WITH THE MOST RECENT DECISION OF THIS COURT AND OTHER CIRCUIT COURTS AND FAILS TO RECOGNIZE THAT PAYMENT OF AN INFLATED PURCHASE PRICE CAUSES ANTITRUST INJURY TO PURCHASERS OF UNLAWFULLY TIED PRODUCTS	14
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

Aurora Enterprises, Inc. v. National Broadcasting Co., 688 F.2d 689 (9th Cir. 1982) 18
Baker v. F & F Investment, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970) 17
Bell v. Cherokee Aviation Corp., 660 F.2d 1123 (6th Cir. 1981) 7, 12, 20
Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) 12, 20
Bull v. United States, 295 U.S. 247 (1935) 7, 12
City of El Paso v. Darbyshire Steel Co., 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979) 17
Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909) 6, 7, 8, 10
Doherty v. Bartiett, 81 F.2d 920 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936) 14
Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963) 14
Gibbs v. Consolidated Gas Co., 130 U.S. 396 (1889) 5
Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973) 12, 20
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 16, 19
Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127 (3d Cir. 1978) 17
Imperial Point Colonnades Condominium, Inc. v. Mangurian, 549 F.2d 1029 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977) 16, 17, 18
Inter-Continental Promotions, Inc. v. Miami Beach First National Bank, 441 F.2d 1356 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971) 14
Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551 (1984) 7, 11, 16, 19
Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983) 11, 17

TABLE OF AUTHORITIES—Continued

	Page
Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982)	4, 6, 8, 9, 10, 13, 19
Kaiser Steel Corp. v. Mullins, 642 F.2d 1302 (D.C. Cir. 1980), *rev'd*, 455 U.S. 72 (1982)	13
Kelly v. Kosuga, 358 U.S. 516 (1959)	8
Kogod v. Stanley Co. of America, 186 F.2d 763 (D.C. Cir. 1950)	14
Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir.), *cert. denied*, 103 S. Ct. 127 (1982)	12, 20
McMullen v. Hoffman, 174 U.S. 639 (1899)	6, 10, 14
Miller v. Ammon, 145 U.S. 421 (1892)	6
Nathan v. Tenna Corp., 560 F.2d 761 (7th Cir. 1977)	14
Northern v. McGraw-Edison Co., 542 F.2d 1336 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977)	7, 12, 20
Pogue v. International Industries, Inc., 524 F.2d 342 (6th Cir. 1975)	7
Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942)	14
United States v. Bayer Co., 135 F. Supp. 65 (S.D. N.Y. 1955)	14
United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961)	14
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)	15, 20
MISCELLANEOUS:	
H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914)	12
15 U.S.C. § 1 (1982)	2
15 U.S.C. § 15 (1982)	2
15 U.S.C. § 15b (1982)	2
15 U.S.C. § 26 (1982)	2
28 U.S.C. § 1254(1) (1982)	2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Souvenir Center, Inc., Historical Reviews, Inc., Williamsburg Wax Museum, Inc., and the National Civil War Wax Museum ("petitioners") respectfully petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the court's judgment of February 10, 1984, in *National Souvenir Center, Inc. v. Historic Figures, Inc.*, No. 82-2329 and consolidated cases Nos. 82-2330, 82-2337, 83-1268, 83-1269, and 83-1270.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported; it is unofficially reported at 5 Trade Reg. Rep. (CCH) ¶ 65,850 and appears as Appendix A to this Pe-

tition.[1] The orders of the district court from which appeal was taken, and the district court's Memoranda, one of which is reported at 554 F. Supp. 182, appear as Appendix B. The orders of the court of appeals denying petitioners' petition for rehearing and suggestion for rehearing en banc appear as Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1984. A timely suggestion for rehearing en banc was denied on April 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

This case involves Sections 4, 4B and 16 of the Clayton Act, 15 U.S.C. §§ 15, 15b and 26 (1982), and Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). These statutory provisions are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioners are corporations that operate wax museums in Williamsburg, Virginia; Gatlinburg, Tennessee; and Gettysburg, Pennsylvania.[2] In the 1960's, petitioners entered into agreements to purchase or, in the case of the Gatlinburg museum, lease figures for display in their museums from respondents for specified prices, which petitioners paid in full. In addition, as a condition of their agreeing to furnish the display figures, respondents also required petitioners to enter into long-term franchise agreements that required respondents to provide various "franchise" services, including historical research, plan-

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[1] The Court of Appeals did not issue a separate Judgment. A letter from the Clerk's Office stating that the Judgment was entered on February 14, 1984 is included in Appendix A.

[2] *See* n.*, *supra*. Petitioner Williamsburg Wax Museum operates the museum in Williamsburg; petitioner National Souvenir Center, Inc. operates the museum in Gatlinburg; petitioner Historical Reviews, Inc. was the original franchisee of the Gatlinburg museum; petitioner National Civil War Wax Museum operates the museum in Gettysburg.

ning assistance, and advice regarding promotion, advertising and operating procedures.

For these franchise services, petitioners were required to pay five percent of their gross receipts for twenty years and, in the case of the Williamsburg agreement, two and one-half percent of gross receipts thereafter. The payments for franchise services were due quarterly. Respondents enforced the payment obligations; on those occasions when petitioners' payments were late, respondents demanded either in writing or orally that payment be made.

In 1977, petitioners filed suits against respondents for damages and injunctive relief, alleging that the contracts were illegal tying arrangements in which, as a condition of acquiring the display figures (the tying product), petitioners were required to purchase the franchise services (the tied product). They also alleged that the lease of the figures for the Gatlinburg museum unlawfully perpetuated respondents' monopoly power in the display figures market. Simultaneously with the filing of the complaints, petitioners ceased making either franchise payments or lease payments to respondents. Respondents counterclaimed for the amounts withheld plus interest.

The district court denied respondents' motion for summary judgment on petitioners' antitrust claims on May 19, 1981. After reviewing the evidence, the court found that respondents had contractually bound themselves "to package together" the display figures and the franchise services. App. B at 34a. The court held that there were disputed issues of fact as to each of the elements of the tie-in offense and that, if those issues were resolved favorably to petitioners, the contracts would be illegal. App. B at 36a. The court also rejected respondents' arguments for summary judgment or dismissal of petitioners' monopolization claims. App. B at 35a n.8.

Nevertheless, the district court subsequently granted judgment for respondents without ever deciding the merits of petitioners' claims. On September 3, 1982, not-

withstanding this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), the district court ruled that petitioners could not raise the illegality of the agreements as a defense to respondents' counterclaim seeking to enforce them.[3] And on December 23, 1982, it ruled that petitioners' affirmative antitrust claims were barred by the statute of limitations. App. B at 53a-61a.

On February 10, 1984, a panel of the United States Court of Appeals for the District of Columbia Circuit affirmed for the most part the district court's rulings. The court rejected petitioners' illegality defense with respect to the tying arrangement on the ground that the promises to pay franchise fees "do not appear on their face to be primarily means to enforce the allegedly illegal tie-ins." App. A at 23a. The court rejected petitioners' illegality defense with respect to the lease arrangement on the ground that the obligation to pay rent "standing alone" is not illegal. App. A at 24a. The court concluded that neither enforcing the franchise agreements nor enforcing the lease would constitute enforcement of an illegal restraint on competition. App. A at 23a. In addition, the court held, even if an order enforcing those agreements would constitute judicial enforcement of an illegal restraint, that harm "is far outweighed" by other considerations. App. A at 24a.

As to the statute of limitations issue, the court concluded that no franchise services were required to be provided during the four-year limitations period and that the only conduct that had taken place under the franchise agreements during that period was respondents' collection of franchise fees from petitioners. App. A at 17a. The court held that respondents' collection of the franchise payments did not injure competition and thus did not constitute "antitrust harm." App. A at 17a. Because

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[3] The district court first ruled that the illegality of the arrangement was no defense to the counterclaims on May 19, 1981. It denied plaintiffs' motion for reconsideration in light of this Court's subsequent decision in *Mullins* on September 3, 1982. App. B. at 46a.

there had been no "antitrust harm within the limitations period," the court held, petitioners' claims were time-barred. App. A at 17a.[4]

REASONS FOR GRANTING THE WRIT

Taken together, the court's decisions on the illegality defense and statute of limitations issues mean that respondents will continue to reap the benefits of their allegedly illegal tying arrangement and monopolization, petitioners will be required to continue to pay an allegedly excessive price for the tied product, and the federal courts will lend their aid to the enforcement of the allegedly illegal arrangement—even though the antitrust claims have survived a motion for summary judgment and no court has determined whether the agreements violate federal law. In petitioners' view, this result if left to stand would undermine the policies of the federal antitrust laws and place the federal courts in the untenable position of acting in furtherance of unlawful conduct.

I. THE COURT OF APPEALS' DECISION NARROWS THE ILLEGALITY DEFENSE IN TWO RESPECTS, BOTH OF WHICH CONFLICT WITH DECISIONS OF THIS COURT AND RAISE IMPORTANT QUESTIONS OF FEDERAL LAW AND POLICY.

It has always been the law, until this case, that "none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain." *Gibbs v. Consolidated Gas Co.*,

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[4] The court did, however, reverse the district court's grant of summary judgment on petitioners' antitrust challenge to the lease of display figures in the Gatlinburg contract. It reasoned that requiring petitioners to continue paying rent meant they could not replace the figures throughout the duration of the lease. The lease thus had a "continuing anticompetitive effect," and petitioners' claim could not properly be barred by the statute of limitations. App. A at 19a.

130 U.S. 396, 412 (1889) (citation omitted).[5] As this Court put it recently in *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 77 (1982), "our cases leave no doubt that illegal promises will not be enforced."

In this case, however, the court of appeals held that illegal promises should be enforced. The court ruled that petitioners' allegation that the promise to purchase the franchise services was an unlawful tying arrangement did not state a defense to respondents' effort to enforce the promise. The court also rejected petitioners' illegality defense to the Gatlinburg lease. The court distinguished between promises that are "the means to enforce" an illegal scheme, which a court may not enforce (App. A at 23a), and the "fruits" of such a scheme, including promises to pay prices in excess of "the fair value of the goods and services received and consumed." App. A at 23a. The latter, the court held, may be judicially enforced because such promises are not illegal "standing alone" (App. A at 24a) and because entertaining the illegality defense in such cases would require complex proof and would let the buyer escape from its side of the bargain. App. A at 24a.

Both rationales of the decision below are wrong; both were rejected by this Court in *Mullins*; and, if left uncorrected, both would significantly restrict the scope of the illegality defense. The appellate court's decision is likely to have far-reaching precedential significance and to engender confusion in an area of the law that this Court recently sought to clarify. This Court should grant

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[5] *See Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262-63 (1909); *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899) ("no court will lend its assistance in any way towards carrying out the terms of an illegal contract"); *Miller v. Ammon*, 145 U.S. 421, 426 (1892) ("[w]hen a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover").

certiorari to prevent this confusion and the distortion of its prior decisions.[6]

A. The Court Of Appeals' Decision Ignores This Court's Long-Standing Prohibition Against Judicial Enforcement Of Promises That Were Extracted In Violation Of The Antitrust Laws.

Petitioners have alleged, and this Court should assume, that the franchise agreements are part of an illegal tie-in—indeed, that petitioners' coerced promise to purchase franchise services is precisely that aspect of the arrangement that renders it unlawful. Enforcement of the franchise agreements would thus lend the courts' aid to the illegal scheme and permit respondents to reap its forbidden "fruits," including, in particular, the amount by which the contract price for the services exceeds the fair market value of those services.[7] This result is contrary to the "long established" rule

> "that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality . . . ." [8]

The court of appeals has, in effect, carved out an exception to this rule. But in so doing, it misunderstood

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[6] Even if petitioners' affirmative claim of an antitrust violation arising out of the tie-in arrangement were barred by the statute of limitations, as the appellate court concluded, the statute of limitations would not bar the defense of illegality. *See Bull v. United States*, 295 U.S. 247 (1935).

[7] *See, e.g., Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1133 (6th Cir. 1981); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977). Damages for an illegal tying arrangement could also include other kinds of economic injury. *See Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1558 (1984) (invalid tying arrangements might force the buyer to purchase a product it did not want at all); *Pogue v. Intern'al Indus., Inc.*, 524 F.2d 342, 345 (6th Cir. 1975) (tie-in may cause business failure).

[8] *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262 (1909).

this Court's latest two decisions concerning the illegality defense and the substantive law of tie-ins as well.

In both *Kelly v. Kosuga*, 358 U.S. 516 (1959), and *Mullins*, this Court recognized that the illegality defense must be permitted where its rejection "would be to make the courts a party to the carrying out one of the very restraints forbidden by the [antitrust laws]." 358 U.S. at 520; 455 U.S. at 80. The critical flaw in the appellate court's reasoning in this case is that it misunderstood what constitutes judicial enforcement of an illegal restraint.

The Court in *Kelly* disallowed the illegality defense because the contract at issue was a lawful contract for the sale of goods "at a fair price" and "for a fair consideration." 358 U.S. at 521. Ordering payment of the fair price did not require the court to give its imprimatur to an illegal agreement. The fact that the parties in *Kelly* had also made a separate agreement to withhold goods from market in violation of the antitrust laws did not matter; the court was not asked to enforce that agreement, and its illegality had not affected the price or other terms of the contract provision being enforced.

The Court in *Kelly* distinguished between the agreement at issue in that case and agreements like that at issue in the Court's earlier decision in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909), in which the Court upheld the illegality defense in a suit to recover an "excessive purchase price" that was the "fruit" of an antitrust violation. 212 U.S. at 262. The Court in *Continental Wall Paper* concluded

> "that to give judgment for the excessive purchase price so fixed in favor of such a vendor would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act."

358 U.S. at 520.

The Court adhered to and clarified these principles in *Mullins*. The Court reaffirmed the principle that, while an illegality defense is inapplicable to an effort to enforce a lawful contract for goods sold at a "fair price," a court will not enforce a contract for goods sold at "an excessive purchase price" extracted in the course of an antitrust violation. 455 U.S. at 80. The Court thus held that the contract at issue there—which called for petitioner to make certain payments for each ton of coal it had previously purchased from non-union employers—could not be enforced.

In reaching this result, the Court in *Mullins* rejected the very arguments on which the court of appeals rested its decision in this case. Just as the court of appeals here reasoned that the agreements could be enforced because they were not illegal "standing alone" (App. A at 24a), so respondents in *Mullins* argued that the contract there at issue was not illegal "standing alone." But this Court rejected that argument in *Mullins*:

> *"The argument is that employers' contributions to union welfare funds are not, in themselves and standing alone, illegal* acts and that ordering Kaiser to pay would therefore not demand conduct that is inherently contrary to public policy. *Kaiser, however, did not make a naked promise to pay money* to the union funds. . . . *If Kaiser's undertaking is illegal* under the antitrust or the labor laws, *it is because of the financial burden* which the agreement attached to purchases of coal from non-UMW producers, even though they may have contributed to other employee welfare funds. It is plain enough that *to order Kaiser to pay would command conduct that assertedly renders the promise* an *illegal* undertaking under the federal statutes.

455 U.S. at 79 (emphasis added).

By the same token, although the court of appeals in this case recognized that enforcement of the illegal tie-in

would have been improper before the tied services were rendered (App. A at 10a, 24a, & n.10), it held that the contract could be enforced now because the services have already been provided, enforcing the contract would not restrain competition in the marketplace, and only a transfer of money is at issue. But the Court in *Mullins* rejected argument, too:

> "*The contention is that since the contract has expired, enforcing the promise to contribute will not bring about any of the evils that the antitrust or labor laws are designed to prevent. But if a promise is illegal at its inception* and cannot be enforced during the term of the contract, *it does not spring to life and become enforceable when the contract expires.* If penalizing Kaiser for purchasing coal from producers without contracts with the UMW is illegal, it is not less so if the penalty is extracted after the termination of the promise. *The suit is still a suit on a presumptively illegal undertaking.* If a promisee need only wait until a contract expires to enforce an illegal provision, the defense of the legality would obviously be ephemeral. Cases such as *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909), and *McMullen v. Hoffman*, 174 U.S. 639 (1899), confound such a rule."

455 U.S. at 81 n.6 (emphasis added).

The Court in *Mullins* nowhere suggested—as the court of appeals in this case concluded—that the illegality defense applies only where the judicially mandated conduct is the *means* of enforcing an illegal restraint. To the contrary, *Mullins* reaffirmed the "long established" rule that courts will not aid a wrongdoer to secure the "fruits" of illegal schemes. Pursuant to this rule, courts prior to this case have uniformly refused to permit wrongdoers to use the courts to recover ill-gotten gains. They have refused to enforce contract provisions requiring payment for services previously rendered or goods

previously supplied, penalties for past conduct or even agreements to divide the spoils of an illegal conspiracy.[9]

This heretofore unbroken rule that courts will not aid a wrongdoer to secure the fruits of its illegal scheme prohibits judicial enforcement of the contracts at issue in this case. The contracts for the sale of franchise services that respondents seek to enforce are the fruits of respondents' illegal tying arrangement. The very purpose of the unlawful tie-in arrangement was to require petitioners to purchase the franchise services (the tied product), and it is that requirement that makes the arrangement unlawful. Similarly, the lease payments are the fruits of the illegal scheme in which respondents sought to monopolize the display figures marketplace, and it is the very lease agreement which respondents seek to enforce that violates the antitrust laws.

The refusal of courts to enforce the fruits of illegal agreements takes on added significance in the context of illegal tie-in arrangements. Just last month, this Court reiterated the oft-repeated principle that tie-in arrangements are illegal in part precisely because they require buyers, like petitioners here, to "pay a higher price" for the tied product. *Jefferson Parish Hospital District No. 2*

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[9] *See* cases cited in n.13, *infra*. The only circuit court case since *Mullins* other than this one to discuss application of the illegality defense to tying arrangements is *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1060 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983). There, the court disallowed the illegality defense on the ground that the contract sought to be enforced was not the illegally tied agreement. The court explained that the buyer in that case "does *not* allege that [the seller] is requesting an *inflated price* for the [contract product at issue] *nor* does [the buyer] allege that the [contract product at issue] is *a tied item*." (emphasis added). In this case, in contrast, petitioners do allege that the franchise services are the tied product and that they are injured as a result of having to purchase that product pursuant to an illegal tying arrangement and to pay an inflated price for it.

v. Hyde, 104 S. Ct. 1551, 1557 n.15 (1984), *quoting* H.R. Rep. No. 627, 63d Cong., 2d Sess. 12-13 (1914).[10] Thus, by enforcing the illegally tied franchise agreements in this case, the Court would not only be helping the wrongdoers reap the fruits of their illegal arrangement, but also would impose the very injury—forced payment of illegal overcharges—that the antitrust laws are intended to prevent.[11]

If left to stand, the court of appeals' decision would severely undermine the illegality defense. The defense would apply only where the conduct being enforced is illegal "standing alone," and courts would be available—indeed, required—in all other cases to aid wrongdoers to reap the fruits of their illegal schemes. The decision would thus thrust the courts into a role that this Court has for decades rightly held is not proper for the federal courts.

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[10] *See also Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1284 (11th Cir.), *cert. denied*, 103 S. Ct. 127 (1982); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1133 (6th Cir. 1981); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 447-48 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Gray v. Shell Oil Co.*, 469 F.2d 742, 750 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). The court of appeals in this case overlooks the significance of the economic impact of the tying arrangement on the sale of the tied product. The court states that the sale of the franchise services, the tied product, constituted "a routine exchange," implying that the terms of the sale were unaffected by the alleged antitrust violation. App. A at 23a. To the contrary, if the tying arrangement is unlawful as petitioners allege, it is at least in part because it enabled respondents to sell the franchise services—not in a "routine exchange"—but in an unlawful exchange and at a higher price than petitioners would otherwise have paid for them.

[11] Under the circumstances, petitioners should be permitted to recover overcharges paid in the past and in the future under the doctrine of recoupment. *See, e.g., Bull v. United States*, 295 U.S. 247, 262 (1935). It would be anomalous for a court both to enforce the agreement and, simultaneously, to require repayment of the overcharges.

B. The Court Of Appeals' Decision Permits Courts To Enforce Illegal Agreements By Substituting Their Concept Of Public Policy For Policies Embodied In Federal Statutes In Contravention Of This Court's Decision in *Mullins*.

The court of appeals also erred in concluding that, even if requiring payments pursuant to the franchise agreements enforces an illegal restraint, the defense of illegality should be disallowed because of the complexity of proof that entertaining the illegality defense would require and the fear that petitioners, having already received the tied product, should not be unjustly enriched by nonenforcement of the payment provisions. App. A at 24a. The court of appeals' rationale rests, in effect, on the premise that courts may enforce illegal agreements by substituting their notions of public policy for policies embodied in federal statutes.

The court of appeals in the *Mullins* case had relied on the same notions of public policy (642 F.2d 1302, 1307-08, 1311-13), and this Court reversed. In so doing, this Court rejected any balancing approach that focused on whether litigation had commenced before or after the consideration was paid under the contract (455 U.S. at 81 n.6.) or on whether the illegality of the contract was easy or difficult to ascertain. To the contrary, the Court held, "a federal court has a duty to determine whether a contract violates federal law before enforcing it." 455 U.S. at 83.[12] The Court in *Mullins* thus followed a long line of decisions in which courts have recognized that equitable doctrines such as unjust enrichment and waiver have no place in an action brought to enforce an unlawful contract.[13]

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[12] In *Mullins*, as here, the issue was whether a federal court will enforce an illegal agreement. Very different considerations would arise in an action seeking recovery in restitution or quantum meruit for the value of goods or services provided.

[13] 455 U.S. at 81 n.6. Courts have frequently refused to enforce contract clauses that were found to be illegal where the plaintiff

The reliance of the court of appeals in this case on a balancing of equitable or discretionary factors to determine the availability of the illegality defense cannot be reconciled with this Court's decision in *Mullins* or the prior cases. Moreover, the court of appeals' decision revives the uncertainty about the availability of the illegality defense which this Court sought to put to rest in *Mullins*. The Court should grant certiorari to clarify this important area of federal law.

II. THE COURT OF APPEALS' DECISION ON THE STATUTE OF LIMITATIONS ISSUE CONFLICTS WITH THE MOST RECENT DECISION OF THIS COURT AND OTHER CIRCUIT COURTS AND FAILS TO RECOGNIZE THAT PAYMENT OF AN INFLATED PURCHASE PRICE CAUSES ANTITRUST INJURY TO PURCHASERS OF UNLAWFULLY TIED PRODUCTS.

The court of appeals' holding that petitioners' antitrust challenge to the tying arrangement is barred by the statute of limitations conflicts with this Court's most recent decision on illegal tying arrangements and with

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was suing for money owed for services previously rendered or goods previously supplied. *E.g., McMullen v. Hoffman*, 174 U.S. 639 (1899); *Farbenfabriken Bayer A.G. v. Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *Kogod v. Stanley Co. of America*, 186 F.2d 763 (D.C. Cir. 1950); *United States v. Bayer Co.*, 135 F. Supp. 65, 72 (S.D.N.Y. 1955). And courts have reached this result even where the defendant himself benefitted from that which made the contract clause illegal. (*E.g., McMullen v. Hoffman, supra*; *Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., supra*; *United States v. Bayer Co., supra*). As this Court recognized in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 565 (1961), "even if [nonenforcement of an illegal contract] . . . in a given case may seem harsh . . . that result is dictated by the public policy manifested by the statute." *See also, e.g., Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942); *Nathan v. Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977); *Inter-Continental Promotions, Inc. v. Miami Beach First Nat'l Bank*, 441 F.2d 1356 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971); *Doherty v. Bartlett*, 81 F.2d 920 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936).

decisions of several other circuit courts. This Court should grant certiorari to resolve the conflict.

The court of appeals recognized that the controlling test was that stated by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971):

> "[i]n the context of a conspiracy to violate the antitrust laws, . . . *each time a plaintiff is injured by an act of the defendants* a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."

App. A at 11a (emphasis added). But the court of appeals held that, although requiring petitioners to make continuing payments for the tied franchise services caused "pecuniary" harm to petitioners, it did not cause "antitrust injury." App. A at 11a, 17a. The court reasoned that petitioners had already received the tied services and that enforcement of the agreement now would no longer "directly affect competition in the tied product market." App. A at 11a.[14]

The court's decision draws into unusually sharp focus the inconsistency between two lines of authority in the lower courts. The first line of authority, which consists

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[14] This conclusion was based on the court of appeals' finding that the franchise contracts required respondents to provide franchise services only at the outset of the contract term, and not throughout the term of the contract. This factual finding was made for the first time on appeal. In the district court, petitioners introduced evidence that the contracts required respondents to furnish franchise services throughout the term of the agreements. This evidence included a contract requiring respondent Lynch to provide "the continuing services which respondent National [Historical Museums, Inc.] is required to render to such franchisee under the terms of the franchise agreement . . ." and a letter from respondent Dorfman to a prospective franchisee explaining that the 5 percent franchise fee is for a "continuing association over the franchise period on advertising, promotion, etc.;" the court of appeals ignored both of these documents in its opinion. The district court did not resolve the dispute, but instead pretermitted the issue on an erroneous law-of-the-case theory. App. A at 12a-13a.

of certain statute of limitations cases, concludes that a seller's receipt of unlawfully extracted payments does not constitute antitrust injury. The second line of authority, which consists of substantive cases on illegal tying arrangements culminating in this Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984), recognizes that a buyer's payment of overcharges extracted through illegal tie-ins constitutes antitrust injury.

The well-spring of the conflict appears to be found in this Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In that case, Hanover, a shoe manufacturer, alleged that United, a manufacturer of shoe machinery, had monopolized the shoe machinery industry by its practice of leasing and refusing to sell its machinery. This Court affirmed the lower courts' finding of unlawful monopolization and held that antitrust injury results "[a]s long as the seller continues to charge the illegal price." 392 U.S. at 489. The Court stated that

> "when a buyer shows that the price paid by him for materials purchased for his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4 [of the Clayton Act]."

392 U.S. at 489.

United argued that Hanover's claims were time-barred because its lease-only policy commenced, and "Hanover's cause of action arose" years earlier. 392 U.S. at 502 n.15. But the Court rejected that argument, explaining that, unlike a refusal to deal or other non-contractual offense, Hanover was faced with a "continuing violation" and continuing harm. Thus, the Court concluded, "[a]lthough Hanover could have sued in 1912 . . . , it was equally entitled to sue in 1955." *Id.*

The Fifth Circuit applied the rationale of *Hanover Shoe* to a tying arrangement in *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029

(5th Cir.), *cert. denied*, 434 U.S. 859 (1977). In that case, the court held that a challenge to an illegal tying arrangement was not barred by the statute of limitations where the buyer had continued to make payments for the tied product during the limitations period. The court concluded that "an antitrust cause of action continues to accrue so long as a defendant *continues to accept benefits* under or assert the validity of an allegedly unlawful tying contract." 549 F.2d at 1039 (emphasis added).

Two other circuits, the Third and the Seventh, appear to accept the "continuing benefits" theory as stated in *Mangurian*. In *Baker v. F&F Investment*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970), on which the court in *Mangurian* relied, the Seventh Circuit rejected defendants' statute of limitations defense on the ground that defendants had collected payments under an allegedly illegal installment contract within the limitations period. The court held that, so long as defendants were "receiving the benefit through continuing enforcement of their unlawful scheme" the statute of limitations would not commence to run. 420 F.2d at 1200 (citation omitted). Similarly, in *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 139 (3d Cir. 1978), the Third Circuit expressly adopted the "well reasoned" rationale of *Mangurian* in holding that a claim arising out of a lease that excluded plaintiff from a shopping center was not barred by the statute of limitations.

Other statute of limitations cases, however, have been uncomfortable with the "continuing benefits" theory enunciated in *Mangurian*. Indeed, other panels of the Fifth Circuit have twice rejected the argument that defendants' continued receipt of payments under an illegal contract extends the statute of limitations.[15] These panels

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[15] *Kaiser Aluminum & Chemicals Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983); *City of El Paso v. Darbyshire Steel Co.*, 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979) (allegation of a collusive bid in violation of Section 1 of the Sherman Act). The

distinguished *Mangurian* on the ground that the statute of limitations had been tolled there because the amount of damages could not be ascertained at the time the disputed contract was signed, even though the court in *Mangurian* had expressly said that issues of speculativeness as to damages were "not involved" in that case. 549 F.2d at 1034 n.14.[16]

At least one other circuit has rejected the "continuing benefits" theory. In *Aurora Enterprises, Inc. v. National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982), the Ninth Circuit held that defendants' continued receipt of payments for a tied product "is not enough to restart the statute of limitations." 688 F.2d at 694.

These latter cases, then, although marred by doctrinal confusion, seem to mean that the continued payment by a buyer of illegally extracted overcharges does not constitute antitrust injury. The court of appeals' decision in this case reflects an application of this rule.[17]

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court's decision in *Avondale* is confusing. Although the court rejected the continuing benefits theory enunciated in *Mangurian*, it was also careful to point out that the payments which defendant had received were not for the unlawfully tied product. 677 F.2d at 1054.

[16] The distinction of *Mangurian* on the ground that the amount of future damages could not be ascertained does not make sense anyhow. The proper remedy there, as in any challenge to an unlawful executory contract, was to void the contract and thus prevent future injury from payments under the contract. (Moreover, in *Mangurian*, the amount of the allegedly illegal payments could be adjusted periodically by the defendants with reference to the consumer price index; the panels in the later cases concluded that this indexing precluded the plaintiff from calculating the amount of damages he would suffer. The same argument, of course, is available to petitioners in this case, where the payments owed to respondents are based on a percentage of the uncertain gross receipts over a 20-year or longer period.)

[17] In *General Aircraft Corp. v. America, Inc.*, 482 F. Supp. 3, 10 (D.D.C. 1979), the only other time the issue appears to have been considered in the District of Columbia Circuit, the court adopted the *Mangurian* reading of *Hanover Shoe*.

This rule, however, is inconsistent, not only with *Mangurian* and like cases, but also with a different line of authority—the substantive antitrust law of tie-in arrangements—culminating most recently with this Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984). In *Jefferson Parish*, this Court recognized that the antitrust prohibition on illegal tie-in arrangements was "especially" intended to protect purchasers from precisely the kind of injury—payment of an excessive price—that petitioners here allege they have incurred.[18]

The Court's recognition in *Jefferson Parish* of the antitrust injury incurred by purchasers—like petitioners here—who are required to pay excessive purchase prices pursuant to illegal tying arrangements comports with the rationale of earlier Court decisions. In *Hanover Shoe*, *supra*, the Court held that antitrust injury results "[a]s long as the seller continues to charge the illegal price." And in *Mullins* the Court concluded that the agreement was illegal under the antitrust laws, if at all, "because of the financial burden" that it imposed upon Kaiser. 455 U.S. at 79.

Consistent with this Court's rationale in *Jefferson Parish*, decisions of the Third, Sixth, Eighth, Ninth, and Eleventh Circuits recognize that purchasers under illegal

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[18] 104 S. Ct. at 1559-60 ("[F]rom the standpoint of *the consumer —whose interests the statute was especially intended to serve*—the freedom to select the best bargain [in the tied market] is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package.") *See* 104 S. Ct. at 1557 n.15 (quoting from the legislative history of the Clayton Act which stated that tie-in agreements are proscribed in part because "[t]he public is *compelled to pay a higher price . . .*."); *id.* at 1558 ("the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms"). (emphasis added).

tying arrangements or similar restrictions are entitled to damages for the overcharges extracted from them by such arrangements.[19] While these cases do not directly address the statute of limitations issue, they do make clear that enforcement of illegal agreements in cases like this one would cause "antitrust injury" by imposing cognizable pecuniary harm upon purchasers of illegally tied products.

These two lines of cases—the "continuous benefits" cases and the "antitrust injury" cases—are not consistent. The antitrust injury cases recognize that the antitrust prohibition against unlawful tying arrangements is intended, in part, to protect buyers from payment of overcharges and that their payment of such overcharges constitutes antitrust injury. Yet, the continuing benefits cases conclude, as did the appellate court here, that the "receipt of payments" by the seller does not constitute a continuing antitrust harm sufficient to begin the limitation period. App. A at 17a.

The "antitrust injury" cases articulate a standard that correctly implements the test set out in the *Zenith Radio* case. That case, as noted above, held that a new cause of action arises "each time a plaintiff is injured by an act of the defendants." 401 U.S. at 338. Under this test, the buyer "is injured" whenever he pays an unlawfully high price; and his injury is the result of "an act of the defendants," at least where—as here—the seller takes affirmative steps to enforce the illegal agreement.

The court of appeals erred in this case because it failed to recognize that petitioners were injured each time re-

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[19] *See, e.g., Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir.), *cert. denied*, 103 S. Ct. 127 (1982); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1133 (6th Cir. 1981); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 447-48 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Gray v. Shell Oil Co.*, 469 F.2d 742, 750 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

spondents required them to pay the unlawfully high price pursuant to the illegal tying agreements. Under *Zenith*, a new cause of action arose each time the contract was enforced, and new causes of action will arise if the contract is enforced in the future. The critical flaw in this case, like the other "continuing benefits" cases, is the failure to recognize that the benefits extracted by the seller are simply the flip side of injury suffered by the buyer.

This Court should grant certiorari to resolve the conflict among the cases and to correct the failure of the recent continuing benefits cases to recognize that the antitrust laws are intended in part to protect purchasers like petitioners here from precisely the kind of injury they have suffered and will be required to continue to suffer if respondents are permitted to enforce their illegal tying arrangement without judicial scrutiny.

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the court of appeals.

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May 21, 1984

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(2)

83-1905

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Petitioners,

v.

HISTORIC FIGURES, INC., *et al.*,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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71 pp

INDEX OF APPENDICES

Page

Appendix A—Opinion and Order amending Opinion of the United States Court of Appeals for the District of Columbia Circuit in *National Souvenir Center, Inc. v. Historic Figures, Inc.*, No. 82-2329 and consolidated cases (February 10, 1984) 1a

Appendix B—Memorandum Order (May 19, 1981), Order and Final Judgment and Memorandum (September 3, 1982), and Order and Memorandum (December 23, 1982) of the United States District Court for the District of Columbia in *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, C.A. No. 77-0093 and consolidated cases.. 32a

Appendix C—Orders of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc (April 12, 1984) 62a

Appendix D—Statutes Involved 66a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2329

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Appellants

v.

HISTORIC FIGURES, INC., *et al.*,

No. 82-2330

WILLIAMSBURG WAX MUSEUM, INC.,
Appellant

v.

HISTORIC FIGURES, INC., *et al.*,

No. 82-2337

NATIONAL CIVIL WAR WAX MUSEUM,
Appellant

v.

HISTORIC FIGURES, INC., *et al.*

No. 83-1268

NATIONAL CIVIL WAR WAX MUSEUM,
Appellant

v.

HISTORIC FIGURES, INC., *et al.*

No. 83-1269

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Appellants

v.

HISTORIC FIGURES, INC., *et al.*

No. 83-1270

WILLIAMSBURG WAX MUSEUM, INC.,
Appellant

v.

HISTORIC FIGURES, INC., *et al.*

Appeals from the United States District Court
for the District of Columbia

(Civil Action Nos. 77-01243, 77-00093 & 77-00131)

Argued December 14, 1983

Decided February 10, 1984

Jerome S. Wagshal with whom *Nelson Deckelbaum* was on the brief, for appellants.

David J. Cynamon with whom *James C. McKay* was on the brief, for appellees.

Before: TAMM and WALD, *Circuit Judges*, and HENLEY,* *Senior Circuit Judge*, United States Court of Appeals for the Eighth Circuit.

Opinion for the Court filed by *Circuit Judge* WALD.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

WALD, *Circuit Judge*: These appeals spring from a series of pre-trial rulings by the district court in three consolidated antitrust cases involving wax museums; the effect of these rulings is to deny all relief on the claims filed. Plaintiff-appellants are commonly owned corporations which operate wax museums in Williamsburg, Virginia, Gatlinburg, Tennessee, and Gettysburg, Pennsylvania. Between 1962 and 1967, all three appellants entered into agreements to purchase or lease display figures for their museums from appellees and to become appellees' "franchisees". In 1977, the appellants filed antitrust claims alleging that the appellees illegally tied the franchise arrangements to the initial sale or lease of the wax figures. Appellants National Souvenir Center, Inc. and Historic Reviews, Inc., which jointly run the Gatlinburg museum, also claimed that appellees unlawfully exercised their monopoly power in the wax figure market to require leasing rather than selling the figures. Upon filing suit, all appellants stopped paying the franchise fees and rents required by the allegedly illegal agreements. Appellees then counterclaimed for recovery of overdue payments and interest.

The district court made several rulings relevant to the issues involved in this appeal. It first denied appellants' motion that appellees' attorneys be disqualified because they had previously represented one plaintiff in matters allegedly related to negotiation of one of the agreements at issue here. It then denied appellees' motion for summary judgment based on their claim that the antitrust charges were patently insubstantial, but granted them summary judgment on their contract counterclaims, awarding them the overdue franchise and lease fees, prejudgment interest on those fees, and ordering the appellants to pay all future franchise fees as they become due. Finally, the court granted summary judgment for the appellees on the ground that the antitrust claims were barred by the statute of limitations. The appel-

lants appeal all adverse rulings including the remedial order requiring them to pay overdue franchise fees with interest and all future fees as they become due.

We affirm the dismissal of the appellants' tying claims on statute of limitations grounds. We find, however, that the statute of limitations is not a proper ground for dismissing the Gatlinburg appellants' monopoly leasing claim. Although we do not wholly agree with the district court's analysis of the applicability of the appellants' antitrust defenses to appellees' counterclaims for overdue franchise fees and lease payments, we agree with the court that those defenses may not be raised, given the facts of these cases. Therefore, we affirm the award of past due franchise and lease payments. We do not find, however, that the district court sufficiently justified its order requiring appellants to pay future franchise fees as they become due. The result is a remand for further proceedings on the Gatlinburg monopoly leasing claim and of the order to make future payments.

I. BACKGROUND

A. *The Franchise Relationship*

This lawsuit was spawned in January, 1957, when Frank Dennis incorporated appellee Historic Figures, Inc. (Historic) to operate a wax museum in Washington, D.C. The display figures in the museum were provided by appellee Lynch Display Corporation (Lynch), a company formed by appellee Earl Dorfman in March, 1957, to manufacture such figures. The figures were made of a vinyl plastic material rather than the traditional beeswax and, according to the appellants, "were considered a substantial improvement over the true wax figures." Brief for Appellants at 15. Lynch agreed to provide the figures for the Washington museum and to assist in installing them in appropriate historical settings. In return, Historic agreed to purchase figures exclusively from Lynch

and, for a five year period, to act as Lynch's sales agent to other wax museums.[1]

Historic soon expanded its business to "franchising" museums in different parts of the United States. The first franchise was granted by Historic's subsidiary National Historical Museums, Inc. (NHM), in 1960, to appellant-National Civil War Wax Museum (Gettysburg), which was owned primarily by Chaim Uberman. According to Dennis's affidavit accompanying appellees' first motion for summary judgment, the agreement between NHM and Gettysburg obligated NHM to provide Lynch figures at cost, and to "furnish, at Gettysburg's request, services 'in connection with the establishment of a museum by franchisee' including historical research for the figures and display scenes, advice on the cast of characters, and story line, assistance in planning floor layouts and advice on promotional material and operating procedures." Brief for Appellees at 9. The appellants contend, however, that NHM also was obligated to "provide continuing franchisor services to its franchisees in the form of assistance in the efficient operations of the museum" throughout the twenty year franchise relationship. Brief for Appellant at 21. In return, Gettysburg agreed to pay NHM 5% of its annual gross receipts for twenty years, beginning in April, 1962, when the museum opened.

In May, 1962, NHM entered a similar agreement with appellant Historic Reviews, Inc. (Gatlinburg). NHM agreed to provide essentially the same service as it provided Gettysburg in return for 5% of Gatlinburg's gross receipts for the nineteen year four month term of the agreement. Unlike Gettysburg, Gatlinburg did not purchase the display figures from Historic, but rather leased them directly from Lynch for the term of the agreement for an annual minimum rent plus 15% of gross annual

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[1] Historic entered subsequent agreements, after expiration of the initial five year term, which obligated Lynch to provide figures for museums which Historic had franchised.

receipts over $100,000. NHM also agreed not to grant another wax museum franchise within 200 miles of Gatlinburg during the term of the agreement.[2]

Uberman established a third franchised wax museum in Williamsburg, Virginia. NHM and appellant Williamsburg Wax Museum, Inc. (Williamsburg) entered a franchise agreement on September 22, 1967. NHM obligated itself to provide the same services as for Gettysburg and Gatlinburg, and not to franchise another wax museum within 100 miles of Williamsburg. In return, Williamsburg agreed to pay NHM 5% of its gross receipts for twenty years, and 2½% of gross receipts thereafter.

The agreements are not typical franchises. *See* Brief for Appellants at 20; Brief for Appellees at 12-13. As the district court recognized:

> [T]he characteristics that generally typify a franchise are not present here: there is no operation under a common name or designation, no cooperative advertising, no periodic inspections, and no establishment of common standards or business practice.

Williamsburg Wax Museum, Inc. v. *Historic Figures, Inc.*, Civ. No. 77-0093, slip op. at 3 n.5 (May 19, 1981) (Memorandum Order granting defendants' motion for summary judgment on their counterclaims, but denying summary judgment for defendants on plaintiffs' antitrust claims). Indeed, precisely what NHM provided in return for the "franchise fee" is a critical issue in the case. Appellees characterize the franchise agreements as

> intended to get the museums off the ground by providing experienced assistance "in connection with the establishment of a wax museum" and by offering Dorfman's consultant services to the franchisees for this purpose only for the period prior to and during

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[2] At the time the franchise agreement was executed, Gatlinburg was owned by a Tennessee entrepreneur, Shelby Boyd. However, in 1964, he sold it to Uberman's company

> the opening of each museum. . . . Therefore, . . . NHM and Dorfman were obligated during the terms of the agreements "to stand by" to provide additional services as requested and paid for by the franchisees (and with respect to Gatlinburg and Williamsburg, also were under a continuing obligation not to establish competing wax museums in specified geographical areas) but the franchisees were under no obligation either to request or pay for such additional services.

Brief for Appellees at 13. The appellants' interpretation of the agreements, on the other hand, is quite different. They claim that "actual services, not merely a standby commitment, were due from the defendants for the franchise fee payments, but that the defendants generally failed to honor this obligation." Brief for Appellants at 20. The record, however, shows no particular instance where NHM provided additional services, beyond start-up services, except for an additional charge.

B. *The District Court Rulings*

The district court first considered appellants' motion to disqualify defendants' counsel, Covington & Burling (C&B), on the ground that it has previously counselled one appellee, Gettysburg, regarding the franchise agreement involved in this suit. *Williamsburg*, slip op. at 4 (Nov. 26, 1980) (Memorandum). The district court's inquiry focused on whether "there is a substantial relationship between the present litigation [involving the franchise agreements] and the matters on which C&B previously provided advice to Gettysburg." *Id.* at 4. After examining the record before it, the court denied appellants' motion to disqualify C&B on the ground that "there is not the slightest evidence or even suggestion in all these materials that C&B advised Gettysburg with respect to the franchise agreement." *Id.* at 7.

The district court next turned down appellees' motion for summary judgment on appellants' antitrust claims.

It noted that the elements of a *per se* tying violation under Section 1 of the Sherman Act, 15 U.S.C. § 1, are

> (1) that the challenged arrangement is in fact a tying arrangement, (2) that the seller has sufficient economic power with respect to the tying product, and (3) that a "not insubstantial" amount of interstate commerce in the tied product is affected.

Williamsburg, slip op. at 5-6 (May 19, 1981) (Memorandum Order). It found there were genuine issues of material fact on all three elements. First, it rejected appellees' "attempts to analogize these cases to traditional franchise cases" involving a single product or products that go "hand-in-hand with [each] other," *id.* at 7 n.10, observing that whether the "franchise" and figures were so related that they constituted a single product was a genuinely disputed issue of fact. Second, it was not able to find that the Lynch display figures were "not sufficiently unique" or that "satisfactory substitutes were available," and that therefore appellees did not have a monopoly in the tying product market. Finally, it could not conclude that the franchise fees NHM collects affected only an "insubstantial" amount of interstate commerce. On the basis of such factual disputes, the district court declined to rule that appellants' *per se* tying claim was invalid as a matter of law.

The district court, however, did grant summary judgment for appellees on their counterclaims. It initially interpreted *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), and *Mullins* v. *Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), *rev'd*, 455 U.S. 72 (1982), to preclude a defense to a contract action in a case such as this based on the illegality of the contract under the antitrust laws, because the illegality defense was limited to situations where "enforcement . . . would make the court a party to the illegality." *Williamsburg*, slip op. at 10 (May 19, 1981) (Memorandum Order). After the Supreme Court re-

versed this court's ruling in *Kaiser*, 455 U.S. 72, it reconsidered, but concluded, once again, that as long as "the promise being sued on is not itself illegal under the antitrust laws," *Kaiser* did not require recognition of the defense. *Williamsburg*, slip op. at 2 (Sept. 3, 1982) (Memorandum). The promise to pay being sued on in this case was not itself illegal, the district court said, since any antitrust damages in this case "would not necessarily include a recovery of the fees paid by plaintiff under the contract." *Id.* at 3. It thus refused to vacate the grant of summary judgment for appellees. Subsequently, the district court ordered that appellants pay all overdue charges due under the agreement, plus prejudgment interest on them, *Williamsburg* (Nov. 4, 1982) (Order adopting plans for stay of final judgment entered September 3, 1982), as well as all future charges as they become due.

The district court finally dismissed appellants' antitrust claims-in-chief as barred by the Clayton Act's four year statute of limitation, 15 U.S.C. § 15b. *See Williamsburg*, 554 F. Supp. 182 (D.D.C. 1982) (dismissing tying claims); *National Souvenir Center, Inc.* v. *Historic Figures, Inc.*, Civ. No. 77-1243 (Jan. 31, 1983) (Memorandum dismissing suit based on unlawful use of monopoly power). It reasoned that since the agreements were executed well over four years before appellants filed suit, they were barred unless appellees committed new "overt acts" within the limitations period which caused antitrust injury. Finding none, the court dismissed the suits.

Appellants appeal from all the adverse rulings of the district court. In addition, they also ask us, in remanding, to reverse the district court's consolidation of these three cases, claiming that such consolidation may create confusion for a jury. We turn now to consider the merits of these appeals.

II. The Statute of Limitations

Appellants brought their antitrust claims under the treble damage provision of the Clayton Act, 15 U.S.C. § 15. Section 4B of that Act provides:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

15 U.S.C. § 15b. The primary question in this appeal is when the appellants' cause of action "accrued."

We assume for purposes of this issue, as the district court did, that appellants' complaints state a valid cause of action. It follows, then, that appellants could have raised their antitrust claim as soon as the allegedly unlawful agreements were executed and they suffered harm therefrom. But this does not mean their cause of action necessarily "accrued" only at that time. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968), the Supreme Court held that although an unlawful lease-only policy first affected the plaintiff in 1912, a suit instituted in 1955 was not barred by Pennsylvania's six year statute of limitations, since the lease-only policy was "conduct which constituted a continuing violation of the Sherman Act . . . [and] inflicted continuing and accumulating harm on Hanover." *Id.* The "continuing violation" exception to the rule that the action accrues at the time the initial violation first injures the plaintiff was further delineated by the Court in *Zenith Radio Corp.* v. *Hazeltine, Inc.*, 401 U.S. 321, which stated:

> [i]n the context of a conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Id. at 338. Under *Zenith* and *Hanover Shoe*, then, any act within the limitation period that effectuates an antitrust injury pursuant to the conspiracy [or in this case the agreement] gives rise to an action for damages. For their action to survive, plaintiff-appellants had to show an "overt act" pursuant to the original tying arrangement by the appellees within the limitation period which caused them an antitrust injury. *See Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045, 1055-56 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 729 (1983); *Electroglas, Inc.* v. *Dynatex Corp.*, 497 F. Supp. 97, 105 (N.D. Cal. 1980).

In the case of a genuine tying arrangement, the "overt act" requirement may be satisfied merely by the parties continuing to maintain contractual relationships that directly affect competition in the tied product market. *See, e.g., Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975); *Electroglas*, 497 F. Supp. at 105; *Aamco Automatic Transmissions, Inc.* v. *Tayloe*, 407 F. Supp. 430 (E.D. Pa. 1976); *Material Handling Industries, Inc.* v. *Eaton Corp.*, 391 F. Supp. 977, 980 (E.D. Va. 1975). This is because the evil of a tying arrangement is that it allows a seller who has monopoly power in the tying product market to use it as leverage to gain a share of the tied product market. *See Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 498 (1969); *Northern Pacific Rail Co.* v. *United States*, 356 U.S. 1, 5-6 (1958). In so doing, the monopolist forecloses the share of the secondary market involved in the tying arrangement from competitors, and in addition is able to charge more for the tied product than the purchaser would have paid absent this leverage. Tying arrangements, even if not strictly enforced, "are binding obligations held over the heads of vendees which deny defendants' competitors access to the fenced-off market on the same terms as the defendant." *Northern Pacific*, 356 U.S. at 12. They effectively transfer the seller's monopoly leverage in the tying market

to contractual obligations in the tied market. The critical issue thus becomes whether the agreements, or appellees' actions pursuant thereto, obligated appellants to deal only with appellees or otherwise discouraged appellants from turning to other suppliers in the tied product market within the statute of limitations period.

To make this determination, we have first to identify the "tied product". At oral argument appellees' counsel characterized it as "the franchise." As best we can fathom, he meant the long-term association with NHM along with the start-up advice and stand-by availability that was sold to appellants at the time the agreements were executed. The appellants, on the other hand, specifically alleged that the tie-in was of promotion, advertising and other services related to museum operations which appellees were obligated to provide appellants in payment for their franchise fees. If the appellees are correct, then performance of the agreement, even if it involved an initial tie-in, would have no anticompetitive effect on the market thereafter and so would not survive the statute of limitations bar.

The district court, in granting summary judgment for appellees, found in favor of their contention that the agreements did not call for the appellees to provide promotional, advertising or other operation-related services during the limitation period in return for the franchise fees. The district court, however, apparently did not review the record to ensure that this was not a disputed issue. Instead it asserted that, "[i]t is the law of these cases that the parties intended any post start-up services to be paid for separately, over and above the ongoing franchise fees" relying on its statement in an earlier Memorandum Order of May 19, 1981, that

> [u]nder the "franchise" agreements, defendants were obligated to provide various start-up services or products, and they agreed to "make themselves available" to provide further services at additional

cost, in exchange for a fee of five percent of the franchisee's annual gross receipts.

Williamsburg (Memorandum Order granting summary judgment in part and denying it in part).[3]

In the proceedings leading to the order of May 19, 1981, however, the parties did not litigate whether the tied product was start-up services and a standby commitment, or provision of promotions and advertising without further costs throughout the term of the agreement. For the appellants to survive summary judgment on the viability of their antitrust claims, they had to show only that there were factual issues about whether there was *a* separate product that was tied to the purchase of the museum figures, and whether appellees had a monopoly on those figures. Because the factual issue of whether the tied product was to be provided throughout the term of the agreement as opposed to at the beginning only was immaterial to the court's disposition in its May 19th order, the law of the case doctrine does not apply. *See Russell* v. *Commissioner of Internal Revenue*, 678 F.2d 782, 784-85 (9th Cir. 1982) (dictum in prior decision "is not part of the law of the case"). However, we affirm the district court on a different basis. We conclude that the record before the court on the summary judgment motion does not support the appellants' contention that there is a genuine issue of fact regarding the appellees' obligations to provide continuing services for the basic franchise fee throughout the term of the agree-

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[3] Of course, this court is not precluded from considering an issue that the lower court found to be the law of the case. *See* 18 Federal Practice and Procedure, Wright, Miller & Cooper § 4478 (1981). "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." United States v. United States Smelting Refining and Mining Co., 339 U.S. 186, 198-99 (1950).

ments.[4] Hence, the district court's critical assumption that the agreements did not so provide was valid.

Turning to the record on the scope of the agreements, we look first and foremost at the terms of the franchise agreements themselves. Appellants contend that each agreement "on its face" obligates the appellees to provide continuing services for the basic franchise fee. *See* Reply Brief for Appellants at 8. We do not agree. The Gettysburg agreement, which is typical of all three agreements, provides:

> [NHM] will advise FRANCHISEE regarding the scenes and figures to be displayed in FRANCHISEE's museum, the selection of a museum site, the layout designs, and other similar problems which may arise in connection with the establishment of a museum by FRANCHISEE. [NHM] will also advise FRANCHISEE regarding administrative procedures for the efficient operation of FRANCHISEE's museum, including accounting procedures, turnstile and ticket operations, building maintenance, and promotion and advertising techniques. In connection with such advice, [NHM] will make available to FRANCHISEE the services of a qualified individual for two consultation periods, not to exceed one week each in duration at FRANCHISEE's request during the period ending 30th day of SEPTEMBER, 1962. . . .

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[4] The appellants explicitly stated below, at the time they argued against the appellees' motion for summary judgment on the statute of limitations, that this factual issue was in dispute. *See* Volume 3 of the Supplemental Record Excerpts [henceforth cited as SRE]. But mere assertions of facts in pleadings and affidavits, when unsupported by any evidence, are not necessarily sufficient to preclude summary judgment. *See* Exxon Corp. v. Federal Trade Commission, 663 F.2d 120, 128 (D.C. Cir. 1980) (purely speculative issues of fact need not be preserved for trial); Pignous S.A. de Mecanique de Precision v. Polaroid Corp., 657 F.2d 482 (1st Cir. 1981) ("factual dispute is . . . genuine if manifested by 'substantial' evidence going beyond allegations of the complaint").

> In consideration of the unique figures and the services to be furnished by [NHM], FRANCHISEE agrees to pay to [NHM] for a period of Twenty (20) years following the date of the opening to the public of FRANCHISEE's museum an amount equal to Five per cent (5%) of the gross admission income received by FRANCHISEE from the operation of its museum.

This key passage from the agreement indicates to us that NHM did not obligate itself to provide continuing services over the years as the franchise agent. It provides for *advice* relating to the "*establishment* of a museum" and "*administrative procedures* for the efficient operation" including advice on "promotion and advertising *techniques*." (Emphasis supplied). It also sets out the extent of the services to be rendered "in connection with such advice," *i.e.*, it was not to exceed two weeks of consultation during the period ending September 30, 1962. Although there is no set term for the franchise itself, the agreement requires Gettysburg to pay a fee for twenty years. It seems clear that most of this fee is an extended payment for the Lynch figures. Only a tortuously strained interpretation of this language supports appellants' contentions that NHM was obligated to provide, as well, an undefined and openended amount of promotion, advertising and other museum services throughout the twenty year period without further pay.

Appellants point, additionally, to the affidavit of Saul Eric Uberman, to demonstrate appellees' continuing obligation to provide services. But Saul Uberman, the son of Chaim Uberman and vice president of C.M. Elberman Enterprises, Inc., the corporate successor of the appellants, was not involved in negotiating any of these agreements. Beyond the assertion that "it was never the understanding of either Frank Dennis nor of Earl Dorfman that the franchisor's obligations under the three franchise agreements were limited to merely a stand-by

commitment,"[5] 3 SRE at 690, his affidavit suggests that certain meetings and telephone contacts between appellants and appellees that cannot be tied to additional fee payments *might be* evidence of provision of additional services under the agreements.[6] *Id.* at 610. This obviously is pure speculation. The affidavit concludes by noting that Saul Uberman had requested services from Frank Dennis and Earl Dorfman on several occasions, but that they did not comply with these requests. Appellants place great significance on the fact that neither Dennis nor Dorfman ever stated in reply to these requests that the services would not be provided because they had to be paid for separately. *See id.* at 611. This second negative inference, however, is as speculative as the first.

Reviewing the record as a whole, we find most striking the appellants' inability to point to a single concrete instance before suit was filed when appellees either provided services within the limitations period for no additional fee, or appellants complained that the lack of such free services breached the agreements. In the end, we simply find these bits and pieces and the *reasonable* inferences drawn from them, even when viewed in the light most favorable to appellants, insufficient to raise a genuine issue of material fact as to whether the agreements obligated the appellees to provide advertising and promo-

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[5] This is the type of assertion without supporting justification that we must consign to the category of conclusory statements that will not defeat a grant of summary judgment. *See, e.g.*, Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1117 (5th Cir. 1979); *see also* Habib v. Raytheon Co., 616 F.2d 1204, 1211 (D.C. Cir. 1980) (holding such statements created genuine issue of fact only because matters involved were by nature "shrouded in secrecy").

[6] Appellants point to no evidence that these contacts in fact involved services provided without fee. In contrast, appellees cite several specific instances where services were provided for additional charges. *See* Brief for Appellees at 12 & n.1.

tional services on a continual basis over the life of the franchise without additional compensation.

After concluding that the tied product was only initial start-up services, the district court inquired into the agreement's ongoing anticompetitive effects and determined that the appellants suffered "only pecuniary and not antitrust harm within the limitations period." *Williamsburg*, 554 F. Supp. at 184. We agree with the district court that mere receipt of payments under an agreement that at some time had anticompetitive effects on the tied product market but no longer has such effects, does not cause "antitrust harm," and does not constitute a continuing antitrust violation. As the district court pointed out,

> [i]f the law were otherwise, the statute of limitations would have little force whenever a contract allegedly executed in violation of the antitrust laws provided for long term payments: there would be no repose until four years after the last installment payment.

Williamsburg, 554 F. Supp. at 184. We also agree with the district court that appellees' commitment to stand by and provide services at fair market value would not seem in any way to discourage the appellants from purchasing the allegedly tied services from other sellers of comparable services, and so would not inhibit competition in the tied market. Because no "overt act" in the four years preceding appellants' suit had any effect on the market, we affirm the district court's grant of summary judgment as to the tying claims on statute of limitation grounds.

We do not agree, however, with the district court's subsequent dismissal on statute of limitations grounds of Gatlinburg's claim that it was forced to lease the Lynch figures as part of appellees' conspiracy to monopolize the wax museum display figure market. *See National Souvenir Center, Inc.* (Jan. 31, 1983) (Memorandum granting

appellees summary judgment on monopolization claims based on Gatlinburg lease on statute of limitations grounds). Appellants alleged that the Gatlinburg lease, like the leases found illegal in *Hanover Shoe*, 392 U.S. at 486 n.3, perpetuated appellees' monopoly power in the wax figure market. *See* Brief for Appellants at 54. They say that the required lease discouraged them from exercising "independent judgment" about whether to dispose of the Lynch figures and replace them with competitors' products at any time in the future and so reinforced appellants long-term monopoly position. *See* Brief for Appellants at 53-54; *cf. Hanover Shoe* 392 U.S. at 507 (appendix to opinion of the court). We admit to extreme skepticism about the substantive validity of this monopoly lease claim based on maintenance of a single lease by an alleged monopolist.[7] We are aware of no case recognizing such a claim. Appellees' sale of the Lynch figures to other wax museum franchisees seriously undercuts appellants' arguments that appellees relied on the *lease as a mechanism* to discourage replacement of the figures with those of competitors during the lease term, or that leasing rather than selling significantly affected the market for figures.[8] Nonetheless, we are not asked here to review the

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[7] As we and the district court read Gatlinburg's monopolization claim, it does not hinge on restrictions attached to the lease but on the mere fact that the figures were leased rather than sold. *See National Souvenir Center*, slip op. at 4 (Jan. 31, 1983) (Memorandum). Even if appellants do contend that the lease contains unlawful restrictive conditions, we suspect that they will have difficulty demonstrating that the conditions in the single lease had either sufficient anticompetitive effects or sufficiently evidenced appellees' alleged anticompetitive motivation to violate the "rule of reason" applicable to such a claim. *See* Genovese Drug Stores, Inc. v. Becrose Associates, 563 F. Supp. 1299, 1305 (D. Conn. 1983); Net Realty Holding Trust v. Franconia Properties, Inc., 544 F. Supp. 759 (E.D. Va. 1982).

[8] Gatlinburg points out that the sale of figures by appellees to other museums was accompanied by resale restrictions. This bolsters its argument that the lease was imposed as a device to preclude

substantive validity of Gatlinburg's claim, only the propriety of its dismissal on statute of limitations grounds.

Our test for determining when an antitrust cause of action stops "accruing" requires us to look at when the challenged contract—in this case the lease—ceases to obligate conduct that has anticompetitive effects. Requiring appellants to continue paying rent for the Lynch figures meant they could not resell the figures or replace them throughout the duration of the lease without severe economic losses; it had as much effect in the market for the figures in 1977 as it did in 1962. Because of this continuing allegedly "anticompetitive" effect of the lease, the statute of limitations is not a proper ground for dismissing the monopolization claims stemming therefrom. *See Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 245 F. Supp. 258, 296 (M.D. Pa. 1965) ("recovery for payments made [within the limitations period] pursuant to leases executed prior to that [period] is not barred by the . . . statute of limitations"), *vacated and remanded on other grounds*, 377 F.2d 776 (3d Cir. 1967),

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a secondhand market in Lynch figures. This argument, relying on resale restrictions, however, was first raised on appeal. *See, e.g., National Souvenir Center*, Complaint ¶ 22 (filed July 15, 1977) (alleging only that compelled lease led to appellants paying "exhorbitant and unconscionable" rate); *id.*, Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 31-32 (filed Jan. 19, 1981) (no mention of resale of figures in argument on leases); *id.*, Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment With Respect to the Gatlinburg Lease Agreement (particularly discussing anticompetitive effect of lease as allowing appellees to monopolize market for repair of figures; never mentioning secondhand market or resale restrictions in other agreements). We leave it to the district court, which is more familiar with the history of the proceedings in this case and the evolution of Gatlinburg's exact contentions, to decide if this claim is sufficiently related to Gatlinburg's original complaint—that the lease precluded "independent judgment" whether to replace the Lynch figures with others—so that Gatlinburg may raise the claim on remand at this late date.

aff'd in relevant part, rev'd in part and remanded, 392 U.S. 481 (1968).

III. ANTITRUST DEFENSES TO CONTRACT COUNTERCLAIMS

Appellants also assail the district court's grant of summary judgment on the appellees' claims for overdue franchise and lease payments. They claim that the judgment requires a federal court to enforce an illegal contract and that result is contrary to the rule governing antitrust defenses recently laid down in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982). The district court read *Mullins* as allowing antitrust defenses to contract suits only where "the promise being sued on is itself illegal" under the antitrust laws. It characterized the promise appellees sued on as one "for monies for goods or services furnished to the plaintiff over a period of years." *Williamsburg*, slip op. at 2 (Sept. 3, 1982) (Memorandum). It apparently concluded that this promise was legal because the "damages [Gatlinburg asked for in its antitrust claim] would not necessarily include a recovery of the fees paid and to be paid by [Gatinburg] under the contract." *Id.* Although our reasoning differs from that of the district court, we agree that under *Mullins* appellants can not raise their antitrust defenses.

To understand *Mullins*, we look first at limitations that courts had imposed previously on the applicability of antitrust defenses to contract suits. The leading pre-*Mullins* case is *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), which involved a suit by a seller of onions against a buyer for failure to pay. As a defense, the buyer, who, like the seller, was an onion supplier, alleged that he had been coerced to buy the onions by the seller's threats to dump a large quantity on the market, thereby depressing prices. The contract-suit defendant agreed to buy 50 cars of onions, and both plaintiff and defendant agreed not to deliver any onions on the market for the

remainder of that trading season, thereby artificially decreasing demand and inflating futures prices. The Court rejected the defendant's argument that, because he was coerced into buying the onions by a threat of unlawful conduct, the contract was unenforceable. In doing so, it noted that "the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court." *Id.* at 518. It then stated the following rule for deciding when to enforce illegal contracts:

> Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act, the courts are to be guided by the overriding general policy . . . "of preventing people from getting other people's property for nothing when they purport to be buying it."

Id. at 520-21 (quoting *Continental Wall Paper Co.* v. *Louis Voight & Sons, Co.*, 212 U.S. 227, 271 (1909) (Holmes, J., dissenting)).

Kosuga was generally viewed as permitting antitrust defenses in only a very narrow class of contract suits, courts being understandably hesitant to interpose complex antitrust issues in a simple suit for breach of contract. *See Mullins*, 642 F.2d at 1311 (D.C. Cir. 1981), *Viacom International, Inc.* v. *Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975). This court, in particular, read *Kosuga* to limit antitrust defenses to situations where the requested enforcement was of agreements not to compete or other direct market restrictions, *that* made "the court . . . a party to an anticompetitive scheme." *Mullins*, 642 F.2d at 1310 (quoting *Kosuga*, 358 U.S. at 520); *see also id.* at 1311 n.9.

This court's decision in *Mullins*, however, was reversed by the Supreme Court. *See* 455 U.S. at 78-79. In *Mullins*, the defendant, a coal producer, agreed to make contributions to United Mine Worker health and retire-

ment funds based in part on the quantity of coal it purchased from non-union producers. The defendant failed to report such purchases and to make contributions based on them. After the contract expired, the union sued to collect the owed contributions. Clearly, enforcement of the promise to contribute to the welfare fund would not have directly impeded competition at that point in time. *See id.* at 81 n.6. Nonetheless, the Supreme Court allowed the asserted antitrust defense, stating:

> If [defendant] Kaiser's undertaking is illegal under the antitrust . . . laws, it is because of the financial burden which the agreement attached to purchases of coal from non-UMW producers, even though they may have contributed to other employee welfare funds. It is plain enough that to order Kaiser to pay would command conduct that assertedly renders the promise an illegal undertaking under the federal statutes.

Id. at 79.

In so holding, however, the Court cited with favor language in *Kosuga* that lower courts had relied on to strictly limit applicability of antitrust defenses. *See* 455 U.S. at 80 ("plea of illegality based on violation of the Sherman Act has not met with much favor") (quoting *Kosuga*, 358 U.S. at 518). In addition, *Mullins* accepted the *Kosuga* rationale that an antitrust defense to a contract suit may be raised only where enforcement "would make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Id.* at 81 (quoting *Kosuga*, 358 U.S. at 520). In *Mullins*, the promise to contribute to the health and retirement funds in proportion to defendant's purchases of non-union coal was a means by which the plaintiff "enforced" restraints on purchases of non-union coal by linking contributions to the purchase of non-union coal. This promise *on its face* embraced the very restraint of trade that the defendant

alleged violated the Sherman Act. Had the Court assisted the union in collecting such contributions, it would have effectively become a party to the allegedly illegal scheme to discourage non-union coal purchases. Thus, in permitting the defendant to raise its antitrust defense in *Mullins*, the Court opened the window only a notch to antitrust defenses, *i.e.*, it refused to enforce a promise to pay that was itself a mechanism to police anticompetitive conduct.

Unlike the "illegal promise" in *Mullins*, the promises to pay franchise fees in this case do not appear on their face to be primarily means to enforce the allegedly illegal tie-ins between the wax figures and start-up services. They appear rather to be a consideration for goods and services, to be paid for on an installment basis, *i.e.*, a routine exchange which *Mullins* was careful to distinguish from the penalty-like agreement it refused to enforce. *See Mullins*, 455 U.S. at 80 (antitrust defense disfavored in action to recover agreed price for goods sold). This is not a case where the appellants turned to an alternative supplier of start-up services and now object to paying a "penalty" for doing so.[9] To transform the contracts here into illegal tie-ins would require complex proof of monopoly power in the tying market and leverage of that power in the tied market. Even then, their vice would extend only to the amount that the agreed prices exceeded the fair value of the goods and services received and consumed—the portion of the prices that could be traced to the illegal practice. The complexity of proof and speculative nature of appellants' defenses seem to us to place

[9] Enforcement of the bulk of the payments as they became due would not have affected the tied market, since the obligations to make most payments arose well after the allegedly tied start-up services had been supplied and consumed; this is in contrast to *Mullins* where the obligation to pay arose at the time of purchase of non-union coal, and enforcement at that time would have imposed an immediate penalty for breaching the union's illegal restraint of trade.

them outside of the *Mullins* exception and clearly within the ambit of disfavor for such defenses articulated in *Kosuga*. And even if there might be grounds for such a defense in other cases, we reject it here, where it was first raised ten years after the figures and the "tied" start-up services had been received and consumed without objection by the buyer.[10] We therefore hold in the circumstances of this case that the obligation to make franchise payments persists and the defense that the original agreement included a tainted tie-in sale may not be raised. The remote danger, in a case such as this, that the court will be a party to enforcing an illegal restraint, seems far outweighed by the probability that allowing the defense would let the buyer escape from its side of a bargain long after it had secured exactly what it had bargained for, as well as involve the courts in a prolonged controversy over whether an illegal tie-in existed due to the seller's market power and how that tie-in affected the agreed price for goods and services.

We also hold that appellants cannot raise any illegality that may attach to the Gatlinburg lease as a defense to appellees' counterclaim for lease payments. Appellants nowhere attack their obligation to pay rent, standing alone, as illegal under the Sherman Act. Such a rationale would lead to the absurd result that all leases violate the antitrust laws. Instead, appellants allege that they were coerced to lease the figures as part of a scheme by ap-

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[10] Our construction of *Mullins* does not necessarily preclude antitrust defenses to all tie-in contracts. Where the tying arrangement calls for payments for ongoing receipt of the tied product, or payments in proportion to the quantity of tied product purchased from competitors, a court might find the payments to be a "mechanism" by which the contract-suit plaintiff "enforces" the tie-in, and allow an antitrust defense to be raised under *Mullins*. *Cf. Avondale*, 677 F.2d at 1058 (under *Mullins*, antitrust defense precluded because plaintiff "did not seek enforcement of the actual tie-in"). This case, however, involves neither an ongoing provision of the tied product nor payments for purchases from competitors.

pellees to perpetuate their monopoly over Lynch figures. But this allegation raises factual controversies, perhaps relevant to appellants' contentions that the lease was part of a bigger scheme to monopolize the wax museum figure market, that are entirely unrelated to the contract claim before us. It is precisely this type of antitrust defense that *Kosuga* clearly held, and *Mullins* affirmed, to be inappropriate in a simple suit for the purchase price of delivered goods. *See Mullins*, 455 U.S. at 80, *Kosuga*, 358 U.S. at 431. In accord with these cases and the district court's decision, we hold that Gatlinburg may not raise the alleged antitrust illegality of its lease of Lynch figures as a defense to appellees' suit for rent.

IV. Relief Awarded for Appellees' Counterclaims

We next consider appellants' attack on the award of prejudgment interest and the order requiring them to make future franchise and lease payments as they come due. Although appellants' obligations to pay franchise fees and rent under the Gettysburg and Gatlinburg agreements ended in 1982, Williamsburg's obligation to pay 2½% of gross receipts runs in perpetuity.

We find no merit to appellants' position on the issue of prejudgment interest. The district court properly followed the District of Columbia's statutory prescription, which states:

> In an action . . . to recover a liquidated debt on which interest is payable by contract or by law or usage, the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid.[11]

D.C. Code § 15-108 (1981).

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[11] Appellants' suggestion that Giant Food, Inc. v. Jack I. Bender & Sons, 399 A.2d 1293 (D.C. App. 1974), precludes prejudgment interest whenever the claim is subject to a counterclaim borders on

We find more convincing appellants' contentions that the district court did not properly justify granting injunctive relief requiring future payment of fees as they become due. The district court apparently did not consider the contract to have been terminated or repudiated.[12] By requiring future payments, it essentially ordered appellants to continue performing their contractual obligations. The court thus denied the appellants any opportunity to repudiate the contract and thereby obligate appellees to mitigate damages flowing from any future breach. *See* Restatement (Second) of Contracts § 350.

The district court, however, entered its order before it determined that the appellees did not owe continuing operating services under the franchise agreements. Thus, after it entered its order, it may have concluded that appellees did not in fact owe anything more to appellants under the franchise agreements. In that case, appellants' failure to pay the fees may have been a total breach. *See id.* § 243 ("Effect of a Breach by Non-Performance as Giving Rise To a Claim for Damages for Total Breach"). But, if that is the case, the damages flowing from the total breach should have been reduced to a sum certain, if possible. The only justification for ordering future payments as they become due would be a finding of total

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the absurd. *Giant* merely held that if a plaintiff obtains a liquidated judgment, and the defendant prevails on a counterclaim that is "an offset in the nature of payment [of the liquidated debt]," then the plaintiff will be awarded interest only on the difference between his claim and the defendant's counterclaim. *Id.* at 1303. *Giant* thus has no bearing here where (1) appellants did not prevail on their claim, and (2) the claim was not one for "an offset in the nature of payment."

[12] The district court explicitly noted it retained jurisdiction to modify its order should the appellees fail in the future to perform any of their obligations under the agreements. *Williamsburg*, slip op. at 4 n.1 (Sept. 3, 1982) (Memorandum). It thus treated the contract as an ongoing one imposing obligations on both appellees and appellants.

breach (after appellees performed their part of the contracts) and so great an uncertainty about the amount of damages (based on future gross receipts) that ordering future payments was necessary to ensure their accurate assessment. *See id.* §§ 359, 360 (specific performance justified where damages not provable with reasonable certainty). The court's rationale is not sufficiently developed for us to determine if injunctive relief ordering payment of franchise fees as they become due is warranted under this theory. We remand to the district court for a determination of whether the breach was total or partial, and if total, whether the nature of the promised payments justifies its order of future payments.

V. Remaining Issues

We need not dwell long on the two remaining points on appeal—the disqualification of C&B and the district court's order consolidating these three cases.

The appellants contend that the district court erred by not finding that C&B had represented Gettysburg in a matter "substantially related" to the franchise agreements at issue here. Brief for Appellants, at 28. The "substantial relation" test, which the district court properly invoked, was meant to protect an attorney's former client from subsequent use of confidential disclosures by the attorney. *See T.C. Theatre Corp.* v. *Warner Brothers Pictures, Inc.*, 113 F. Supp. 265, 168 (S.D. N.Y. 1953). The court should not "inquire into the nature and extent" of any confidential disclosures. *Id.* Still, the party seeking disqualification has the burden of demonstrating a relationship between the matters in which counsel had represented him and those at issue which makes it reasonable to assume that some relevant confidential disclosures were made. *See id.* at 268; *cf. Government of India* v. *Cook Industries, Inc.*, 569 F.2d 737, 739 (2d Cir. 1978) (movant must show matters are almost identical before court will disqualify counsel).

In this case, the district court allowed the appellants to develop a voluminous record on the extent of C&B's representation of Gettysburg. It found that C&B did not represent Gettysburg on matters related to the franchise agreement. It further noted that C&B's representation of Gettysburg was handled primarily through Dennis, who in addition to being owner of appellee Historic was then a conventurer in appellant, Gettysburg. Thus, it concluded that C&B was not in a position to receive information that Gettysburg intended to keep confidential vis-a-vis Historic. We do not think these factual findings are erroneous, much less clearly so. *Cf. Allegaert* v. *Perot*, 565 F.2d 246, 250 (2d Cir. 1977) (holding "substantial relation" test not even implicated in such a situation).

Finally, the issue of whether these cases should not be consolidated because the antitrust issues are so complex that, at trial, a jury might be confused is mooted by our prior rulings.

Conclusion

For the reasons stated above, we affirm the district court's grant of summary judgment for appellees on appellants' tying claims, but vacate that grant on Gatlinburg's monopolization claim stemming from its lease of Lynch figures and remand for further proceedings on that claim. We also affirm the grant of summary judgment for appellees on their contract claims for monies due under the franchise and lease agreements, but vacate the order that appellants pay future fees as they become due, remanding to the district court for reconsideration of that order. We affirm the district court on all other rulings.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-01243

No. 82-2329

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Appellants

v.

HISTORIC FIGURES, INC., *et al.*

And Consolidated Case Nos. 82-2330,
82-2337, 83-1268, 83-1269 and 83-1270

[Filed Feb. 10, 1984]

Before: TAMM and WALD, Circuit Judges, and HENLEY, *Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit.

ORDER

It is ORDERED, by the Court, *sua sponte*, that the Opinion for the Court filed by Circuit Judge Wald on February 10, 1984 be, and hereby is amended as follows:

Page 23 of the slip opinion, lines 1 & 2, delete the first two lines of the text in their entirety, and in lieu thereof substitute the following:

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

"on purchase of non-union coal. By linking contributions to the purchase of non-union coal, this promise *on its face*".

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

NOTE: The language amended by this Order appears on p. 22a of Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D.C. 20001

GEORGE A. FISHER
Clerk

February 10, 1984

RE: Appeal No. 82-2329 et al.—National Souvenir Center, Inc., et al. v. Historic Figures, Inc., et al.

Dear Sir:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Sincerely,

/s/ Denise C. Thomas
DENISE C. THOMAS
Opinions Clerk

Enclosure

DISTRIBUTION:

Nelson Deckelbaum
Jerome S. Wagshal
James C. McKay

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0093

WILLIAMSBURG WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-0131

NATIONAL CIVIL WAR WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-1243

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Plaintiffs,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

[Filed May 19, 1981]

MEMORANDUM ORDER

The above-entitled actions are before the Court on defendants' motions for summary judgment.[1] Plaintiffs

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[1] These actions are related, although not consolidated, and involve essentially the same parties and the same claims. Virtually identical papers have been filed by the parties in all three cases, the instant motions for summary judgment were argued together, and

complain that various agreements between themselves and defendants, and agreements among the defendants, violate the antitrust laws; defendants counterclaim for the fees due and owing under their agreements with plaintiffs.[2] Because the Court finds that there are genuine issues of material fact with regard to plaintiffs' claims, defendants' motions concerning those claims must be denied. Defendants' motions in connection with their counterclaims present different considerations, however, and will be granted.[3]

I

In 1958, Frank Dennis, who was until 1977 the president and chief operating officer of defendants Historic Figures, Inc. (HF), and National Historical Museum, Inc. (NHM), a subsidiary of HF, established a wax museum in Washington, D.C., with the assistance of defendant Dorfman, the founder, president, and principal stockholder of defendant Lynch Display Corporation (Lynch), the manufacturer of the figures displayed in the museum. Unlike the wax figures displayed in the European wax museums that had inspired Dennis to create a similar museum in Washington, the figures designed and manufactured by Dorfman are composed of a plastic material.

The defendants entered into a series of agreements over the years since the founding of the Washington museum, all of which are exclusive sales agreements per-

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there is no factual difference that would warrant a different result in the resolution of the pending motions. This order is dispositive of defendants' summary judgment motions in all of the above-entitled actions.

[2] Defendants have moved for summary judgment on all claims, including their counterclaims.

[3] Also before the Court are plaintiffs' request that certain language be deleted from the Court's order of February 11, 1981, and two motions by plaintiffs to strike. These have been considered by the Court and are denied.

taining to the display figures. The more recent agreements take into account the "franchise" enterprise developed by defendants subsequent to the establishment of the Washington museum. Basically, the defendants bound themselves contractually to package together the sale[4] of the Lynch figures and the "franchises"[5] for new wax museums. Pursuant to these agreements, defendants have franchised a number of museums, including those of the plaintiffs, in conjunction with the sale or lease of the Lynch figures. Under the "franchise" agreements, defendants were obligated to provide various start-up services or products,[6] and they agreed to "make themselves available" to provide further services at additional cost, in exchange for a fee of five percent of the franchisee's annual gross receipts.[7] With regard to the three museums involved in these lawsuits, the total franchise fees (including those paid and those that are the subject of the defendants' counterclaims) amount to more than

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[4] In the case of the Gatlingburg museum, No. 77-1243, the figures were leased on a long-term basis rather than sold. This lease agreement is also challenged, both as part of an illegal tie-in and as an unlawful exercise of monopoly power.

[5] Although the word "franchise" is used in the challenged agreements and in this Memorandum, the characteristics that generally typify a franchise arrangement are not present here: there is no operation under a common name or designation, no cooperative advertising, no periodic inspections, and no establishment of common standards or business practices.

[6] The possible application of Section 3 of the Clayton Act to the facts of these cases turns on whether that which was supplied under the franchise agreements is in the category of "services," as that section applies only to "goods, wares, merchandise, machinery, supplies or other commodities." This is one issue of fact which the Court finds unresolved, and the Court will therefore not dismiss the counts alleging Clayton Act violations.

[7] The payments are to continue indefinitely under the contract applicable to the Gatlinburg museum; the payments are limited to a period of 20 years in the agreements regarding the other two museums.

$750,000; the lease fees incurred by the Gatlinburg plaintiff amount to more than $500,000. The figures, of course, do not reflect the amounts involved in connection with the other seven museums franchised by defendants in the United States.

II

In deciding a motion for summary judgment, factual matters must be viewed in the light most favorable to the party opposing the motion. *Founding Church of Scientology* v. *NSA*, 610 F.2d 824, 836 (D.C. Cir. 1979). The inferences to be drawn from the facts must be viewed in the same manner, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The basic claim[8] in these actions is that defendants unlawfully conditioned the sale or lease of the Lynch display figures to plaintiffs upon the purchase of a "franchise" by plaintiffs. There are two theories on which plaintiffs may be able to prevail with respect to their tie-in claims: (1) they may be able to establish a *per se* tying violation; or (2) they may prevail on a Rule of Reason analysis, that is, if they "can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated," *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 500 (1969) (*Fortner I*). *Accord, United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610,

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[8] Defendants assert that plaintiffs' restraint of trade and monopolization claims with regard to the exclusive dealing arrangements between Lynch and NHM "add nothing to plaintiffs' tie-in claims." Brief for Defendants at 27. No authority is cited in support of that proposition and it apears to be contradicted by the Supreme Court's decision in *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 612 n. 1 (1977). Also rejected is defendants' contention that the language of an amendment to the exclusive sales agreement between Lynch and NHM compels dismissal, on the theory of uncontested facts, of the claim regarding the Gatlinburg lease agreement in No. 77-1243.

612 n. 1 1977) (*Fortner II*); *Bogus* v. *American Speech & Hearing Association*, 582 F.2d 277, 287 (3d Cir. 1978); *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368, 380 (5th Cir. 1977).

The elements of a *per se* tying violation under Section 1 of the Sherman Act, as established in *Northern Pacific Railway* v. *United States*, 356 U.S. 1 (1958), and reiterated in *Fortner I*, *supra*, are (1) that the challenged arrangement is in fact a tying arrangement, (2) that the seller has sufficient economic power with respect to the tying product, and (3) that a "not insubstantial" amount of interstate commerce in the tied product is affected.

As discussed below, the Court finds that there are genuine issues of material fact with regard to each of the three elements, and that defendants' motions with regard to plaintiffs' tie-in claims must, therefore, be denied.

III

To establish the first element, plaintiffs must prove that separate products are involved, that is, that the display figures and the "franchises" do not constitute a single product.[9]

There are several issues of material fact in connection with the question of whether a tying arrangement exists.

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[9] Defendants argue that plaintiffs must, in addition, show coercion. However, if there was, factually, a tying arrangement there also was coercion. "Where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Northern Pacific*, *supra*, 356 U.S. at 6, n.4. In order for plaintiffs to establish that the arrangement is in fact a tying arrangement, they must show that their purchase or lease of display figures was conditioned upon their purchase of a "franchise," that they could not have obtained the display figures separately, and if they make that showing, they have demonstrated coercion.

Defendants assert that this is a "left shoe, right shoe" matter, where one product goes hand-in-hand with the other and severance would not be reasonable; that their business is establishing wax museums, not selling display figures and selling franchises; and that, even if the products are separable in today's market, they were not separable during the infancy of the wax museum industry in this country when the challenged agreements were made. Plaintiffs, on the other hand, point out that the products come from two different sources and are priced separately. Plaintiffs also have submitted evidence through affidavits, including that of a long-time officer of the International Association of Wax Museums, that the products are separable.

Thus, it is quite clear that the issue of whether the display figures and the "franchise" [10] constitute one product or more than one product is, on this record, an issue of fact. Similarly, plaintiffs' evidence in the form of writings by defendant Dorfman containing statements that the Lynch display figures could not be obtained separately from the NHM franchises, and the affidavit of the original organizer of the Gatlinburg museum, Shelby Boyd, to the same effect, are sufficient to raise an issue of material fact with regard to the existence of a tying arrangement in general and with regard to the coercion matter in particular.[11]

The second element under *Northern Pacific Railway*—sufficient economic power with respect to the tying product, here the display figures—may be established through a sufficient showing of uniqueness of those figures. Defendants contend in this respect that the Lynch figures are not sufficiently unique and that plaintiffs could have,

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[10] Defendants' attempt to analogize these cases to traditional franchise cases falls short of the mark since, as noted *supra* at n. 5, the arrangements in question are not typical franchises.

[11] See note 9 *supra*.

like Dennis, engaged the services of someone like Dorfman to manufacture the figures. Plaintiffs, on the other hand, have submitted various statements by Dorfman and Dennis to the effect that trade secrets are involved in the manufacture of the figures and that satisfactory substitutes were unavailable. Again, this question is a genuine one of material fact that cannot be resolved on this record.

The relevant figure for the purpose of assessing the third element under *Northern Pacific Railway*—whether a "not insubstantial" amount of interstate commerce in the tied product is affected—is "the total volume of sales tied by the sales policy under challenge," *Fortner I, supra*, 394 U.S. at 502. On this issue, defendants assert that there is no genuine issue as to whether a "not insubstantial" amount of interstate commerce in the tied product is affected, arguing that plaintiffs disparage the "franchise" as worthless and that a substantial portion of the franchise fees actually represents deferred payments for other items. But that, too, clearly, is an issue of fact; it must be decided on that basis;[12] and summary judgment on a *per se* theory is not proper.[13]

IV.

The final issue before the Court concerns defendants' counterclaims for the fees due and owing under the

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[12] Moreover, the dollar amounts involved here total a great deal more than the $180,000 held "not insubstantial" by the Supreme Court in *Fortner I, supra*, 394 U.S. at 502, and the three museums operated by plaintiffs represent only a portion of defendants' business in display figures and franchises.

[13] Moreover, defendants seem to assume that if they were to establish as a matter of law that plaintiffs cannot prove a *per se* violation they would be entitled to summary judgment on plaintiffs' claims. That is not the law. Even if—contrary to the Court's conclusion—defendants could prevail on summary judgment as to the *per se* theory, plaintiffs would still be entitled to proceed under a "rule of reason" analysis.

franchise agreements and the Gatlinburg lease agreement. The general rule is that a plea of illegality based on violation of the Sherman Act is not an adequate defense to an action based on contract. *Kelly* v. *Kosuga*, 358 U.S. 516, 518 (1959); *Mullins* v. *Kaiser Steel Corp.*, —— F.2d ——, 1980-2 Trade Cas. ¶ 63,537 (D.C. Cir. 1980). The exception into which plaintiffs attempt to squeeze these cases arises where enforcement of the contract "would itself be enforcing the precise conduct made unlawful by the Act." *Kelly* v. *Kosuga*, *supra*, 358 U.S. at 520-21. But as the court made clear in *Mullins*, *supra*, that exception is "tiny"; it "does not lie against a contract that is 'an intelligible economic transaction in itself' "; and only if enforcement of an otherwise valid contract would make the court a party to the illegality will it opt in favor of a windfall for the innocent party to the contract. *Mullins* v. *Kaiser Steel Corp.*, *supra*, 1980-2 Trade Cas. at pp. 76,887-89.

Plaintiffs argue that granting defendants' summary judgment motions with respect to the counterclaims would amount to "deciding the case without determining the antitrust claim." Plaintiffs' Reply Memorandum at 16. On the contrary, under the standards enunciated by the Supreme Court in *Kelly* and by the Court of Appeals for this Circuit in *Mullins*, denying summary judgment on the counterclaims would be tantamount to deciding the antitrust claims in favor of plaintiffs.[14] In order to prevail on the counterclaims, defendants need not show that the franchise and lease agreements at issue do not violate the antitrust laws; a showing solely to the effect that those agreements do not fall within the *Kelly* exception permits the Court to "simply refuse to entertain the illegality defense," *Mullins*, *supra*, 1980-2 Trade Cas. at

[14] Plaintiffs have not moved for summary judgment in these actions. Further, even if all of plaintiffs' factual allegations are true, the purported illegality of the disputed agreements is by no means clear.

76,887, n.6. The Supreme Court's reluctance to supplement the remedies provided by the antitrust laws is particularly appropriate where, as here, plaintiffs' claims for relief under those statutes are before the Court. Accordingly, defendants are entitled to prevail on their counterclaims.

In accordance with the foregoing, it is this 18th day of May, 1981,

ORDERED That defendants' motions for summary judgment with regard to the complaints in the above-entitled actions be and they are hereby denied, and it is further

ORDERED That defendants' motions for summary judgment with regard to all of their counterclaims in the above-entitled actions be and they are hereby granted as to liability, and it is further

ORDERED That defendants shall file within 15 days of the entry of this order a motion for summary judgment as to damages with respect to all of their counterclaims, and plaintiffs shall have 15 days thereafter in which to respond to such motion.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0093

WILLIAMSBURG WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-0131

NATIONAL CIVIL WAR WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-1243

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Plaintiffs,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

[Filed Sept. 3, 1982]

ORDER AND FINAL JUDGMENT

On May 18, 1981, the Court granted summary judgment in favor of defendants as to plaintiffs' liability on defendants' counterclaims. On June 3, 1981, in accordance with the Court's May 18 order, defendants filed motions for summary judgment as to damages. Thereafter, plaintiffs filed an opposition to defendants' motions as well as their own motion to stay further proceedings or in the alternative for reconsideration of the Court's grant of defendants' summary judgment motions with respect to the issue of liability. Plaintiffs also requested oral argument with respect to these matters. By order of September 17 the Court denied plaintiffs' motions for stay or reconsideration. Thereafter, on February 8, 1982, plaintiffs moved to vacate this Court's order granting summary judgment as to the issue of plaintiffs' liability on defendants' state law counterclaims.

Upon consideration of plaintiffs' February 8 motion to vacate and defendants' earlier motion for summary judgment as to damages, and upon consideration of the papers submitted by the parties in connection therewith and the entire record in this case, and the Court having concluded that, subject to the provisions of paragraph 10 below, plaintiffs' motion should be denied and defendants' motion should be granted, and having determined that there is no just reason for delay of entry of final judgment on the counterclaims, it is this 3d day of September, 1982, ordered as follows:

I. *Williamsburg Franchise Agreement Obligations*

1. The motion of defendant National Historical Museum, Inc. ("NHM"), for summary judgment as to damages on its counterclaim is granted, jointly and severally, against plaintiff Williamsburg Wax Museum, Inc., and all successor corporations thereto (including C. M. Uberman Enterprises, Inc.), hereinafter collectively desig-

nated as "Williamsburg plaintiffs," in the amount of $56,382.99 plus such additional interest with respect to overdue franchise fees at the rate of six (6) percent per year as accrued between February 1, 1982, and the date of this Order and Final Judgment, with interest on the combined amount thereof at the rate of six (6) percent per year from the date of this Order and Final Judgment until the date of payment thereof.

2. Williamsburg plaintiffs are ordered and directed to pay to NHM all future franchise fees as they become due in accordance with the terms of the Williamsburg franchise agreement and shall furnish to NHM all such financial reports and make available all such books and records as NHM may request in accordance with the provisions of said agreement.

II. *Gettysburg Franchise Agreement Obligations*

3. The motion of NHM for summary judgment as to damages on its counterclaim is granted, jointly and severally, against plaintiff National Civil War Wax Museum, Inc., and all successor corporations thereto (including C. M. Uberman Enterprises, Inc.), hereinafter collectively designated as "Gettysburg plaintiffs," in the amount of $94,243.60 plus such additional interest with respect to overdue franchise fees at the rate of six (6) percent per year as accrued between February 1, 1982, and the date of this Order and Final Judgment, with interest on the combined amount thereof at the rate of six (6) percent per year from the date of this Order and Final Judgment until the date of payment thereof.

4. Gettysburg plaintiffs are ordered and directed to pay to NHM all future franchise fees as they become due in accordance with the terms of the Gettysburg franchise agreement and shall furnish to NHM all such financial reports and make available all such books and records as NHM may request in accordance with the provisions of said agreement.

III. *Gatlinburg Franchise Agreement Obligations*

5. The motion of NHM for summary judgment as to damages on its counterclaim is granted, jointly and severally, against plaintiff National Souvenir Center, Inc., plaintiff Historical Reviews, Inc., and all successor corporations thereto (including C. M. Uberman Enterprises, Inc.), hereinafter collectively designated as "Gatlinburg plaintiffs," in the amount of $112,161.35, plus such additional interest with respect to overdue franchise fees at the rate of six (6) percent per year as accrued between February 1, 1982, and the date of this Order and Final Judgment, with interest on the combined amount thereof at the rate of six (6) percent per year from the date of this Order and Final Judgment until the date of payment thereof.

6. Gatlinburg plaintiffs are ordered and directed to pay to NHM all future franchise fees as they become due in accordance with the terms of the Gatlinburg franchise agreement and shall in connection therewith furnish to NHM all such financial reports and make available all such books and records as NHM may request in accordance with the provisions of said agreement.

IV. *Gatlinburg Lease Agreement Obligations*

7. The motion of defendant Lynch Display Corporation ("Lynch") for summary judgment as to damages on its counterclaim is granted, jointly and severally, against Gatlinburg plaintiffs in the amount of $328,859.94 plus such additional interest with respect to overdue display figure rental payments at the rate of ten (10) percent per year as accrued between February 1, 1982, and the date of this Order and Final Judgment, with interest on the combined amount thereof at the rate of six (6) percent per year from the date of this Order and Final Judgment until the date of payment thereof.

8. Gatlinburg plaintiffs are ordered and directed to pay to Lynch all future monthly rental fees and percentage rent as they become due in accordance with the terms of the Gatlinburg lease agreement and shall furnish to Lynch all such financial reports and make available all such books and records as Lynch may request in accordance with the provisions of said agreement.

V. *Finality*

9. The Court having determined that there is no just reason for delay, this Order and Final Judgment shall be entered forthwith.

VI. *Stay of Judgment*

10. In accordance with Fed. R. Civ. P. 62(h), enforcement of this Order and Final Judgment shall be stayed until the entry of final judgments on plaintiffs' complaints, or until further order of this Court, subject to the condition that within ten (10) days the parties, or any of them, submit to the Court for its approval a plan and proposed order pursuant to which plaintiffs will be required to deposit with the Clerk of the Court all past due franchise and rental fees, plus interest, as provided in paragraphs 1, 3, 5 and 7 of this Order and Final Judgment, and all future franchise and rental fees as they become due, and pursuant to which the Clerk will be directed to purchase United States treasury bills or other high-yield, appropriately secured obligations and hold them or re-invest them in similar securities pending the entry of final judgments on plaintiffs' complaints or until further order of this Court.

VII. *Retention of Jurisdiction*

11. The Court shall retain jurisdiction to effectuate and enforce the terms of this Order and Final Judgment.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0093

WILLIAMSBURG WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-0131

NATIONAL CIVIL WAR WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-1243

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Plaintiffs,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

[Filed Sept. 3, 1982]

MEMORANDUM

I

On May 19, 1981, the Court granted defendants' motions for summary judgment as to liability on the counterclaims. Plaintiff has moved to vacate that judgment on the basis of *Kaiser Steel Corp. v. Mullins*, 102 S.Ct. 851 (1982). *Kaiser Steel* reversed *Mullins* v. *Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), and it distinguished *Kelly* v. *Kosuga*, 358 U.S. 516 (1959) on both of which this Court had relied in its grant of summary judgment. The motion to vacate essentially presents the question whether the instant action is controlled by the factual situation and the law underlying the Supreme Court's decision in *Kaiser Steel* or by the facts and the law in the earlier *Kosuga*.

In *Kaiser Steel* it was held that a coal producer, when sued on its promise to contribute to union welfare funds based on its purchases of coal from producers not under contract with the union, is entitled to defend based on the illegality of that promise under the antitrust laws. In so holding, the Court departed from the broad pronouncement of the Court of Appeals in the same case which had suggested, as this Court said in its May 19, 1981 memorandum, that a plea of illegality based on a violation of the Sherman Act could not be a defense to an action based on contract. *Kaiser Steel* laid down a narrower and more specific rule. If, as in *Kosuga*, there are two promises in a business relationship, one legal and the other illegal, the legal promise will be enforced notwithstanding the unenforceability of the second promise under the antitrust laws. On the other hand, if, as under the *Kaiser Steel* facts, the promise being sued on is itself illegal under the antitrust laws, it will not be enforced.

Here, defendants are suing in their counterclaim for monies for goods or services furnished to plaintiff over a period of years. Plaintiff's promises to pay for those

goods and services are quite separate and distinct from the possible obligation of defendants to pay damages should it ultimately be found, after a trial, that the provisions of the contracts which conditioned the sale or lease of the display figures at issue here, violated the antitrust laws. These damages would then be measured in accordance with the evidence adduced with respect to the alleged tie-in feature; they would not necessarily include a recovery of the fees paid and to be paid by plaintiff under the contract. Yet it is that which plaintiff is, in effect, demanding in its defense to the counterclaim. To extend *Kaiser Steel* as plaintiff would have it would be potentially to embroil the antitrust laws in every suit to collect payment for goods and services. The motion to vacate will be denied.

II

The parties have each submitted a proposed order and final judgment regarding damages as well as various memoranda on those issues in relation thereto that remain contested.

First. On the question of pre-judgment interest, plaintiff relies upon *Giant Food, Inc.* v. *Jack I. Bender & Sons*, 399 A.2d 1293 (D.C. App. 1979) in support of the proposition that the Court is precluded from awarding such interest. In *Giant Food*, the D.C. Court of Appeals held that on passing upon the prejudgment interest question where there is both a liquidated claim and an unliquidated counterclaim, the District of Columbia courts must apply an "interest on balance" rule, that is, prejudgment interest is to be awarded only on the amount by which the liquidated claim exceeds the unliquidated claim. However, the key fact in that case was that the unliquidated claim, like the liquidated claim, had been reduced to judgment; here not only has there been no judgment but there may never be a judgment in plain-

tiff's favor. There is no basis for plaintiff's opposition to pre-judgment interest.

Second. Plaintiff contends that defendants are not entitled to injunctive relief requiring payment of future franchise and rental fees and granting them access to plaintiff's books and records for the purpose of verifying such payments. The Court has held that plaintiffs are liable for the fees due and owing, and it is established, therefore, that plaintiffs will be liable for future franchise and rental fees as they become due. The Court will not, and it need not, require defendants to file a new lawsuit or a new motion for summary judgment every time another payment under the agreement becomes actually due and owing.[1]

Third. Defendants have requested that the Court direct the entry of judgment on the counterclaim pursuant to Rule 54(b), Federal Rules of Civil Procedure, presumably in order that they may execute thereon. Plaintiff claims that (1) the counterclaim and the principal claim are so intimately linked that the Court should not permit execution on the judgment with respect to the former pending the outcome of the litigation with regard to the latter, and (2) defendants may not be solvent. But, as indicated in Part I *supra*, the claims and the counterclaims are not truly dependent upon one another. As concerns the possible solvency of defendants, they have recommended that the Court adopt the procedure suggested in *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 13 n. 3 (1980) of requiring the losing party to deposit the amount of the judgment with the Court, directing the Clerk to purchase high yield government obligations and to hold them pending the outcome of the

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[1] Plaintiff argues that defendants may fail in the future to perform the agreements or to meet the obligations they impose. Since the Court will retain jurisdiction, it will be able to modify or vacate the injunction should the remote contingency envisioned by plaintiff actually occur.

case. The Court will follow that recommendation and thus eliminate any concern regarding defendants' solvency.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

Dated: September 3, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0093

WILLIAMSBURG WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-0131

NATIONAL CIVIL WAR WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-1243

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Plaintiffs,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

ORDER

For the reasons stated in the accompanying memorandum filed on this date, it is this 23d day of December, 1982,

ORDERED That defendants' motion for summary judgment in civil actions 77-0131 and 77-0093 and for partial summary judgment in civil action 77-1243 be and it is hereby granted, and it is further

ORDERED That the complaints in civil actions 77-0131 and 77-0093 be and they are hereby dismissed with prejudice, and it is further

ORDERED That those counts of the complaint in civil actions 77-1243 alleging antitrust violations due to an illegal tying arrangement be and they hereby are dismissed with prejudice.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

The following ruling is reported at: 554 F. Supp. 182 (D.D.C. 1982); 1982-83 Trade Cas. ¶ 65,202 (Dec. 23, 1982)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0093

WILLIAMSBURG WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-0131

NATIONAL CIVIL WAR WAX MUSEUM, INC.,
Plaintiff,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

Civil Action No. 77-1243

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Plaintiffs,

v.

HISTORIC FIGURES, INC., *et al.*,
Defendants.

MEMORANDUM

Plaintiffs in these consolidated antitrust cases are three wax museums owned in common by C. M. Uberman Enterprises, Inc. since 1973. Each museum came into being

in the 1960's by means of a "franchise agreement" with defendant National Historic Museum, Inc., the wholly owned subsidiary of Historic Figures, Inc. Plaintiffs challenge these contracts as illegal tying arrangements. They contend that the defendants acted in concert illegally to condition the sale or lease [1] of Lynch's display figures on the purchase by plaintiffs of National franchise agreements.[2] The agreements obligated the museums to pay National five percent of their gross admissions receipts for twenty years [3] in exchange for National's promise to provide certain services and to refrain from establishing competing museums in nearby locations.[4] Plaintiffs survived a previous motion for summary judgment in which defendants maintained that no tying violation could have occurred because each contract involved only one product, the establishment of a wax museum. The Court held that whether the contracts

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[1] The figures were sold to Gettysburg (77-0131) and Williamsburg (77-0093). They were leased to Gatlinburg (77-1243). Although the franchise/lease arrangement in Gatlinburg is challenged on a tying theory, the lease is the target of a separate challenge along the lines of a "refusal to sell' such as existed in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

[2] Historic Figures, Inc. and National Historical Museum, Inc. had established a wax museum in Washington, D.C. with the help of defendant Dorfman, the founder, president and principal stockholder of defendant Lynch Display Corporation (Lynch). The defendants later bound themselves contractually to package together the sale of the Lynch figures and the "franchises" for new wax museums.

[3] In addition, the Williamsburg museum agreed to pay National at a rate of 2½ percent for every year of operation past twenty years.

[4] The first franchise agreement states that the percentage payments are "in consideration of the unique figures and services to be performed by National." The second and third agreements refer only to services, presumably because the Gatlinburg museum contracted separately to lease the figures directly from Lynch and the Williamsburg museum contracted to buy them from Lynch.

covered one or two products was a material question of fact inappropriate for summary disposition. Now defendants have moved for summary judgment in two cases and partial summary judgment in the third [5] on the ground that insofar as a tying violation is alleged, it is barred by the Clayton Act's four-year statute of limitations, 15 U.S.C. § 15b.[6] As the contracts that underlie plaintiffs' claims were admittedly executed well over four years before plaintiffs filed their complaints in 1977,[7] the question for decision is whether plaintiffs may invoke one of the judicially-crafted exceptions to Section 15b. After careful consideration of the parties' pleadings and their presentations at oral argument, the Court finds that no exception is applicable. Defendants' motion will therefore be granted.

The two exceptions to which plaintiffs point [8] are not really exceptions at all, but they are actually constructions of what it means for a private antitrust action to "accrue." Under the first of these two constructions, a new cause of action accrues "whenever the defendant commits an overt act in furtherance of an antitrust conspiracy, or in the absence of an antitrust conspiracy,

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[5] Plaintiffs' claim that the Gatlinburg lease was a refusal to sell and an unlawful exercise of monopoly power is unaffected by the instant motion. See note 1, *supra*.

[6] Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

Plaintiffs brought these actions under the treble damages provision of Section 15.

[7] The Gettysburg contract was executed September 22, 1960. The Gatlinburg contract was executed May 31, 1962. The Williamsburg contract was executed September 22, 1967.

[8] Plaintiffs do not invoke the exceptions triggered by a defendant's fraudulent concealment or by the prior initiation of a government antitrust action.

commits an act that by its very nature is a continuing antitrust violation." *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982) (citing *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338-40 (1971) and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 501 n.15 (1968)).[9] Thus, no matter how long ago the initial antitrust violation occurred, the action will not be time-barred by § 15b "if defendant committed further overt acts or continuing violations which injure plaintiff's business during the limitations period." *Electroglas, Inc.* v. *Dynatex Corp.*, 497 F. Supp. 97, 104 (N.D. Cal. 1980). The second construction is more concerned with the effects of a defendant's allegedly illegal act. It allows that act to be " 'revived' outside the limitations period as a basis for damages, because when the act originally occurred, plaintiff's damages were speculative or unprovable." *Kaiser Aluminum, supra*, 677 F.2d at 1051. This theory also derives from *Zenith, supra*.

In an effort to bring themselves within the first theory, plaintiffs have pointed to the continuing payments they made to National, to National's occasional demands for payment, to National's continuing obligation to be available should plaintiffs request its services, and to defendants' general "involvement" with plaintiffs' businesses as evidence that "overt acts or continuing violations" occurred between 1973 and 1977. When asked to explain the antitrust injury occasioned by these alleged overt acts or continuing violations, however, plaintiffs' counsel answered,

> [T]hese plaintiffs were diminished in their business and property. . . . [They] had to shell out money they would not have wanted to shell out if that franchise had not been tied to the sale of the figures.

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[9] In *Zenith*, a conspiracy was alleged and proved. *Hanover* involved no conspiracy but rather the unlawful exercise of monopoly power.

> . . . [T]he money is being paid . . . and there is the antitrust violation.

However, as two federal courts have observed, "the harm that creates the new cause of action must be '*antitrust* harm, *i.e.*, a continuing injury to *competition*, not merely a continuing pecuniary injury to a plaintiff.'" *Kaiser Aluminum, supra*, 677 F.2d at 1055 (quoting *Electroglas, Inc., supra*, 497 F. Supp. at 105) (emphasis in original). If the law were otherwise, the statute of limitations would have little force whenever a contract allegedly executed in violation of the antitrust laws provided for long-term payments: there would be no repose until four years after the last installment payment. This could be years after the original tainted bargain was struck. In all likelihood, some witnesses would be unavailable.[10] In any event, the case would be characterized by exactly that sort of staleness which it is the object of a statute of limitations to prevent.[11]

A brief description of the parties' relationship during the years 1973 to 1977 suffices to show the accuracy of counsel's concession that his clients suffered only pecuniary injury, not anticompetitive injury, within the limitations period. By 1973 the museums had been operating for some time, displaying the Lynch figures obtained in the 1960's and paying franchise fees to National on a quarterly basis. National was still obligated to remain

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[10] This is the case in the instant actions. For instance, three of the five principals involved in the Gettysburg franchise are deceased.

[11] Cases cited by plaintiffs such as *Fitzgerald* v. *Seamans*, 553 F.2d 220 (D.C. Cir. 1977), are not to the contrary. There are no cases that instruct courts to disregard the Clayton Act's statute of limitations simply because of the "strong congressional policy in favor of antitrust enforcement by private damages suits." *Fitzgerald, supra*, 553 F.2d at 227. The dicta to which plaintiffs refer in *Fitzgerald* was limited to the speculative damages exception which, for reasons elaborated upon below, is inapplicable to these cases.

available to perform additional services upon plaintiffs' request, and to refrain from establishing competing museums, but plaintiffs were under no obligation to buy services from National or from any defendant. Plaintiff's pleadings blame defendants for not providing enough service to warrant the franchise fees[12] at the same time that they criticize them for exercising too much involvement in plaintiffs' businesses.[13] In any event, National was paid extra sums for the later services it provided.[14] It is the law of these cases that the parties intended any post start-up services to be paid for separately, over and above the ongoing franchise fees. Memorandum Order of May 19, 1981, at 3. Thus, plaintiffs were free to turn to other sellers of comparable services; they were not locked into purchasing them from National. There is no evidence that plaintiffs ever attempted to buy services elsewhere nor that they were foreclosed from doing so by some act of defendants. Plaintiffs can point to no act within the limitations period by which any of the defendants affected plaintiffs' competitive standing either as sellers or buyers. All they can complain of is their ongoing commitment to National

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[12] The first Uberman affidavit states that from 1973 to 1975 Uberman requested assistance from National, particularly in connection with the museums' advertising campaigns, but that assistance was not forthcoming.

[13] The second Uberman affidavit, filed in conjunction with plaintiffs' supplemental reply memorandum, refers to numerous phone bills that allegedly show Dorfman's continued involvement with the museums after 1973. The memorandum and affidavit failed to mention how telephone calls and visits by Dorfman, the owner of Lynch and a minority stockholder in the Gettysburg museum could amount to acts causing antitrust injury to plaintiffs.

[14] Most of the services anticipated by the agreements were start-up services. The parties dispute what percentage of the franchise payments is allocable to National's future "availability." They also dispute the value of the services provided by National at the time each museum opened. This haggling resembles a breach of contract controversy more than an antitrust violation.

to pay five percent of the annual gross receipts and the occasional demands of defendants regarding that obligation. These are simply "the abatable, but unabated inertial consequences of some pre-limitations action." *Poster Exchange Inc.* v. *National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975).

A defendant's continuing receipt of benefits under an illegal pre-limitations contract may, in certain circumstances, prevent plaintiff's case from being time-barred. This doctrine was discussed in *Kaiser Aluminum, supra*, the Fifth Circuit's most recent pronouncement on the application of § 15b to cases involving long-term payments. In *Kaiser*, the court held that the "continued receipt of contract payments" could work a tolling of § 15b only where damages would have been speculative or unprovable within four years of the initial antitrust violation. The *Kaiser* panel thus incorporated the *Zenith* speculative damages exception, and made it clear that its earlier holding in *Imperial Point Colonnades Condominimum, Inc.* v. *Mangurian*, 549 F.2d 1029 (5th Cir. 1977), hinged on the fact that "damages . . . were not ascertainable at the time of the execution of the contracts . . . because the defendants could arbitrarily and unilaterally continue to engage in acts that amounted to overt acts in furtherance of their antitrust conspiracy." 575 F.2d at 523-24.

In its first reply memorandum, filed before *Kaiser*, plaintiffs relied heavily on *Mangurian*. At oral argument, plaintiffs' counsel attempted to fit the cases within the limits imposed by *Kaiser*, arguing that because the franchise fees were not quantified, but were based on gross receipts and therefore would fluctuate depending upon the museums' performance, damages would not have been provable within four years after the contracts were executed. This is incorrect. The percentage had been fixed in the contracts and defendants could not unilaterally change it.

Moreover, a comparison with *Zenith* shows how inappropriate the speculative damages exception would be in these cases. In *Zenith*, a pre-limitations act of defendant had reduced plaintiff's share of the market. The consequences of this reduced share would continue no matter what Zenith or a court did. The Supreme Court therefore held that Zenith's cause of action did not accrue until Zenith's loss could be more accurately measured. In the instant case, any injury plaintiffs suffered was confined to its dealings with National. Presumably damages would be measured by the difference, if any, between the amount plaintiffs paid for the tied account—the franchise services—and the amount they would have paid for comparable services on the open market. A court could have reduced plaintiffs' franchise obligations by this amount, or eliminated them altogether on the theory that the antitrust laws had been violated, at any time subsequent to the execution of the contracts. All plaintiffs had to do was to sue within the limitations period. It was within the power of a court to make plaintiffs whole (unlike the situation in *Zenith*, where external forces would perpetuate and increase the consequences flowing from plaintiff's reduced market share).

Thus, plaintiffs may not take advantage of the "continuing benefits" theory, because they fail to satisfy the speculative damages element, nor can they take advantage of the speculative damages theory standing alone. Plaintiffs' causes of action "accrued" at the time the contracts with National were executed (1960, 1962 and 1967 respectively). No additional cause of action respecting the tying allegations accrued in the four years before plaintiffs filed their complaints.[15] The allegations based

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[15] This holding is consistent with, if not compelled by, the Court's previous ruling awarding judgment on defendants' counterclaims. The Court held that defendants could collect unpaid and owing franchise fees from plaintiffs because even if the contracts had been executed pursuant to an illegal tie-in scheme, the contracts and pay-

on defendants' alleged tying must therefore be dismissed.[16]

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

Dated: December 23, 1982

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ments thereunder were not in themselves illegal. Memorandum Order of May 19, 1981; Memorandum of September 3, 1982; Order and Final Judgment of September 3, 1982.

[16] Plaintiffs have presented no reason why the leasing of the figures in Gatlinburg dictates a different result with respect to the claims of illegal tying. The lease ran for twenty years, the same length as the franchise agreements. There is no evidence that the lease was renewed during 1973-1977 or that any other overt act or continuing violation occurred, by virtue of the lease, to distinguish the Gatlinburg case from the two cases where the figures had been purchased. Defendants have not interposed a statute of limitations defense to the allegation that the lease was an unlawful exercise of monopoly power, so this aspect of C.A. 77-1243 is left intact by today's ruling.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-01243

And Consolidated Case Nos. 82-2330,
82-2337, 83-1268, 83-1269, 83-1270

No. 82-2329

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Appellants

v.

HISTORIC FIGURES, INC., *et al.*

BEFORE: Tamm and Wald, Circuit Judges, and Henley *, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit

[Filed Apr. 12, 1984]

ORDER

On consideration of the petition for rehearing of Appellants, filed March 26, 1984, and of Appellants' motion for leave to file a supplemental memorandum, it is

ORDERED by the Court that the Clerk is directed to file Appellants' lodged supplemental memorandum and it is

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

FURTHER ORDERED by the Court that the petition for rehearing is denied.

Per Curiam
For the Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 77-01243

And Consolidated Case Nos. 82-2330,
82-2337, 83-1268, 83-1269, 83-1270

No. 82-2329

NATIONAL SOUVENIR CENTER, INC., *et al.*,
Appellants

v.

HISTORIC FIGURES, INC., *et al.*

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and Henley *, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit

[Filed Apr. 12, 1984]

ORDER

The Clerk is directed to file Appellants' lodged supplemental memorandum in support of the suggestion for rehearing *en banc*.

Appellants' suggestion for rehearing *en banc* and the supplemental memorandum in support thereof have been circulated to the full Court and no member has requested

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
For the Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX D

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending

on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

> (A) such foreign state would be denied, under section 1605(a)(2) of title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(b) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of title 28.

Section 4B of the Clayton Act, 15 U.S.C. § 15(b), provides:

§ 15b. Limitation of actions

Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act be revived by this Act.

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in

any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Office - Supreme Court, U.S.
FILED
JUN 7 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C. M. UBERMAN ENTERPRISES, INC., *et al.*,
Petitioners,

v.

HISTORIC FIGURES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where three commonly owned wax museums suspended payments of quarterly fees due under the terms of franchise contracts lawful on their face solely on the basis of the museums' claim that the contracts had been imposed on them ten to seventeen years earlier by means of illegal tying arrangements, did the lower courts properly conclude that an antitrust defense was not available to the museums against the franchisor's suit to recover the suspended payments?

2. Where a wax museum suspended rental payments due under the terms of a lease of wax museum display figures solely on the basis of the museum's claim that the lease had been imposed on it fifteen years earlier by means of the lessor's alleged exercise of monopoly power, did the lower courts properly conclude that an antitrust defense was not available to the museum against the lessor's suit to recover the suspended rental payments?

3. Where three commonly owned wax museums filed lawsuits in 1977 claiming that franchise contracts entered into from ten to seventeen years earlier had been imposed by means of alleged tying arrangements, and where none of the allegedly tied franchise services had been sold to the wax museums within four years of the lawsuits, did the lower courts properly conclude that the lawsuits were barred by the statute of limitations?*

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* The parties to these actions and their affiliations are set forth accurately in the Petition at (i) n.*.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	5
I. The Court of Appeals Properly Applied *Mullins* and *Kelly* in Rejecting Petitioners' Antitrust Defense to Respondents' Contract Claims	6
II. The Court of Appeals' Dismissal of Petitioners' Tying Claims Is Consistent With Applicable Decisions of This Court and Other Circuits	11
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Aurora Enterprises, Inc. v. *National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982) 12, 14, 15
Baker v. *F & F Investment*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970) 14-15
Bass v. *Boston Five Cent Savings Bank*, 478 F. Supp. 741 (D. Mass. 1979) 12
City of El Paso v. *Darbyshire Steel Co.*, 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979) 15
Electroglas, Inc. v. *Dynatex Corp.*, 497 F. Supp. 97 (N.D. Cal. 1980) 12, 13
Farbenfabriken Bayer A.G. v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963) 10
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 13
Harold Friedman, Inc. v. *Thorofare Markets, Inc.*, 587 F.2d 127 (3d Cir. 1978) 14
Imperial Point Colonnades Condominium, Inc. v. *Mangurian*, 549 F.2d 1029 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977) 15
Jefferson Parish Hospital District No. 2 v. *Hyde*, 104 S. Ct. 1551 (1984) 14
Kaiser Aluminum & Chemical Sales, Inc. v. *Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3485 (U.S. Jan. 4, 1983), *cert. denied*, 103 S. Ct. 729 (1983) 11, 12, 13-14, 15
Kaiser Steel Corp. v. *Mullins*, 455 U.S. 72 (1982) .. 3, 4, 6, 7-11
Kelly v. *Kosuga*, 358 U.S. 516 (1959) 3, 4, 6-7, 9-11
Kogod v. *Stanley Co. of America*, 186 F.2d 763 (D.C. Cir. 1950) 10
Landon v. *Twentieth Century-Fox Film Corp.*, 384 F. Supp. 450 (S.D.N.Y. 1974) 12
McMullen v. *Hoffman*, 174 U.S. 639 (1899) 10
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U.S. 173 (1942) 9-10

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Bayer Co.*, 135 F. Supp. 65 (S.D. N.Y. 1955)	10
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971)	13, 15
Statutes:	
15 U.S.C. § 15 (1982)	12
15 U.S.C. § 15b (1982)	4, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1905

C. M. UBERMAN ENTERPRISES, INC., *et al.*,
Petitioners,

v.

HISTORIC FIGURES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

OPINIONS BELOW

In addition to the citations set forth in the Petition, the opinion of the court of appeals is officially reported at 728 F.2d 503.

COUNTERSTATEMENT OF THE CASE

This Petition arises out of a dispute between several small companies involved in the wax museum business over three franchise agreements and a lease entered into between 1960 and 1967. Petitioners are commonly-owned operators of wax museums in Gettysburg, Pennsylvania;

Gatlinburg, Tennessee; and Williamsburg, Virginia. These museums were established in 1960, 1962, and 1967, respectively, under franchise agreements with respondent National Historical Museum, Inc. ("NHM"). Each franchise agreement provided that NHM would furnish, at the request of the franchisee, services "in connection with the establishment of a museum by franchisee," including historical research for the figures and initial display scenes, advice on the initial cast of characters and story line, assistance in planning floor layouts and advice on promotional techniques and operating procedures. App. A at 6, 14a-15a. In return for these start-up services, the franchisee agreed to pay a fee of five percent of its gross annual receipts for twenty years after the opening of the museum. App. A at 5a-6a.[1]

After providing the start-up services called for by the agreement, NHM or associated individuals occasionally performed minor services at the franchisees' requests for which separate fees were charged. But the franchisees were under no obligation to accept such additional services, and no services were provided by NHM or any of the other respondents under the basic franchise fee after the museums were in operation. App. A at 15a-16a & n.6.

The display figures in the petitioners' wax museums were manufactured by respondent Lynch Display Corporation ("Lynch"). The Gettysburg and Williamsburg museums purchased the figures from Lynch, while the Gatlinburg museum leased most of its figures from Lynch for the same term as the franchise. The Gatlinburg lease agreement provided for a minimum annual

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[1] In Gatlinburg, NHM also agreed not to franchise another wax museum within a 200-mile radius of the franchisee's museum during the term of the franchise. In Williamsburg, the franchisee agreed to pay two and one half percent of annual gross income after the first twenty years for as long as it continued to operate as a wax museum, in return for which NHM bound itself not to establish another franchise within a 100-mile radius. App. A at 6a.

rental plus a percentage of annual gross admissions income above $100,000.[2]

In 1977—seventeen years after the first and a decade after the last of the franchise agreements had been executed—each of the petitioners filed an antitrust suit claiming that its franchise agreement had been illegally tied to the initial sale or lease of Lynch display figures. In addition, the Gatlinburg petitioners claimed that in 1962 the respondents had unlawfully exercised Lynch's alleged monopoly power in the wax museum display figure market to require Gatlinburg to lease rather than buy most of the Lynch figures. Upon filing suit, each petitioner stopped paying franchise or rental fees, which previously had been paid regularly and without protest, solely on the ground that the franchise and lease contracts had been imposed by means of antitrust violations. Respondents counterclaimed under their contracts for recovery of the fees withheld.

In 1981, the district court granted summary judgment for respondents as to petitioners' liability on the contract counterclaims and the following year entered final judgment requiring petitioners to pay all past due franchise and rental fees with interest and all future fees as they came due. App. B at 38a-50a.[3] The court applied the principles set forth in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959) (hereafter "*Kelly*") and *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982) (hereafter "*Mullins*"), and held that since respondents sought only to recover money

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[2] Contrary to petitioners' statement that the display figures were "paid in full," Petition at 2, the Gatlinburg museum suspended its rental payments in 1977, five years before the end of the lease term.

[3] In its 1981 decision the court also determined that then disputed issues of fact precluded summary judgment for respondents on the underlying antitrust allegations but noted that "even if all of plaintiffs' factual allegations are true, the purported illegality of the disputed agreements is by no means clear." App. B at 32a-38a and 39a n.14.

owed for goods or services previously provided to petitioners, the facts of these cases did not bring them within the narrow class of cases in which *Kelly* and *Mullins* permit the assertion of an antitrust defense to a contract claim. App. B at 39a, 47a-48a.

The district court subsequently dismissed petitioners' tying claims on statute of limitations grounds, based on its conclusion that the undisputed facts showed petitioners "suffered only pecuniary injury, not anticompetitive injury, within the limitations period" established by Section 4B of the Clayton Act, 15 U.S.C. § 15b. App. B at 53a, 57a. The court employed the same reasoning to dismiss as time-barred petitioners' monopolization claim concerning the Gatlinburg lease.

Petitioners appealed from these and other adverse rulings. On February 10, 1984, a unanimous appellate panel essentially affirmed the district court's decisions. App. A at 2a-28a. Based on its own careful review of the record, the court of appeals concluded that no allegedly tied product or service had been sold to the petitioners during the four years before the suits were filed, and that accordingly no "antitrust harm," *i.e.*, no injury to competition, had occurred within the limitations period to revive petitioners' otherwise stale claims. App. A at 14a-17a.[4]

The court of appeals also agreed that under *Mullins* and *Kelly*, an antitrust defense to respondents' contract claims was not available to petitioners on the particular facts of these cases. App. A at 20a-25a. The court explained that the franchise fees sought by respondents

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[4] The court reversed the dismissal of petitioners' challenge to the Gatlinburg lease. Although it expressed "extreme skepticism about the substantive validity of this monopoly lease claim based on maintenance of a single lease by an alleged monopolist," App. A at 18a, the court determined that the statute of limitations was not the proper basis for dismissing such a claim. App. A at 19a.

were not a means of enforcing the allegedly illegal tie between the display figures and museum start-up services but rather constituted "consideration for goods and services, to be paid for on an installment basis, *i.e.*, a routine exchange which *Mullins* was careful to distinguish from the penalty-like agreement it refused to enforce." App. A at 23a. Similarly, the court held, petitioners' contention that the otherwise lawful Gatlinburg lease was imposed as part of an alleged scheme to monopolize the wax museum display figure market is "precisely [the] type of antitrust defense that *Kosuga* clearly held, and *Mullins* affirmed, to be inappropriate in a simple suit for the purchase price of delivered goods." App. A at 25a.

On April 12, 1984, the appellate panel rejected petitioners' request for a rehearing, and the full court of appeals declined without dissent to rehear the case en banc. App. C at 62a-65a.

ARGUMENT

These lawsuits, now in their eighth year before the courts, involve simple contracts entered into long ago for the sale or lease of wax museum start-up services and display figures. There is nothing unlawful about the contracts themselves. They do not, for example, impose price restraints or territorial restrictions on the franchisee museums. Rather the antitrust illegality claimed by petitioners is entirely external to the contracts: an alleged conspiracy to impose the franchise agreements and the start-up services offered under those agreements by means of a tying arrangement and an alleged exercise of monopoly power to force the Gatlinburg museum to lease rather than buy most of its display figures. On these facts, the court of appeals had no difficulty in applying established antitrust principles to conclude that petitioners could not avoid payments due under such lawful contracts by asserting that the contracts were imposed in violation of the antitrust laws and that peti-

tioners' attempt to challenge the alleged tying arrangement by which the franchise agreements purportedly were imposed was untimely.

Neither of these conclusions warrants plenary review by this Court. The court of appeals was careful to limit its holding to the peculiar facts presented by these cases, *see* App. A at 24a & n.10, and hence the precedential value of the decision below is minimal. More important, the court of appeals' decision is fully consistent with relevant decisions of this Court and other courts of appeals. Petitioners' argument that the rejection of their antitrust defense conflicts with *Mullins* ignores the distinction made in *Mullins* between agreements that violate the antitrust laws, which are subject to an antitrust defense, and agreements that merely are the result of or collateral to alleged antitrust violations, which are not subject to such a defense. Similarly, petitioners' contention that the court of appeals erred in dismissing their tying claims fails to recognize the difference between a violation of the antitrust laws and the damages resulting from such a violation. Every circuit that has considered the question has held that only the former gives rise to a new or continuing cause of action sufficient to overcome the four-year statute of limitations.

I. The Court of Appeals Properly Applied *Mullins* and *Kelly* in Rejecting Petitioners' Antitrust Defense to Respondents' Contract Claims

The rule concerning the availability of an antitrust defense to a contract claim was stated in *Kelly* as follows:

> As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court.
>
> . . . .
>
> . . . Past the point where the judgment of the Court would itself be enforcing the precise conduct

> made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it."

358 U.S. at 518, 520-21 (footnote omitted).

The Court applied that rule in the case before it to strike an antitrust defense to a contract claim for the price of onions sold and delivered. The asserted defense was that the sales contract was part of a larger understanding or conspiracy between the plaintiff and the defendant to keep excess supply off the market and thereby artificially raise the price of onions; the defendant claimed that he had been coerced into purchasing the onions upon the representations of the seller that otherwise the onions would be delivered to the futures market for the purpose of depressing the price of onions, to the defendant's detriment. 358 U.S. at 517.

After discussing the "narrow scope in which the [antitrust] defense is allowed," *id.* at 520, the Court held that the alleged illegal market manipulation scheme was separate from or collateral to the defendant's promise to purchase onions. The latter promise was "an intelligible economic transaction in itself" and therefore was enforceable according to its terms. *Id.* at 521.

Mullins did not purport to alter the rule stated in *Kelly* in any respect. The Court simply found that the contract sued upon in *Mullins* fell within the very narrow category of cases recognized in *Kelly* where a court's failure to entertain an asserted federal antitrust defense would be an error because it could effectively make the court a party to an antitrust violation. 455 U.S. at 79-82.

Unlike the contract in *Kelly*, and unlike those in the present cases, the contract in *Mullins* was not a simple contract for the purchase or rental of goods or services.

It was a collective bargaining agreement between the United Mine Workers and a large number of independent coal producers. One provision of the agreement required the coal producers to make monetary contributions to the UMW's health and retirement funds based on volume of coal actually produced; a second provision, the so-called "purchased-coal clause," required producers to make similar payments with respect to purchases of coal from other producers who were not parties to the collective bargaining agreement. 455 U.S. at 74-75. In defense to an action by the UMW to collect payments due under the purchased-coal clause, Kaiser Steel claimed that the clause effectively constituted a group boycott in violation of the Sherman Act because it imposed a financial penalty on the purchase of nonunion coal. Thus, Kaiser Steel argued, enforcement of the purchased-coal clause would constitute enforcement of the very conduct claimed to be illegal under the antitrust laws. *Id.* at 78.

The Court was receptive to that analysis and held as follows:

> If Kaiser's undertaking is illegal under the antitrust . . . laws, it is because of the financial burden which the agreement attached to purchases of coal from non-UMW producers, even though they may have contributed to other employee welfare funds. *It is plain enough that to order Kaiser to pay would command conduct that assertedly renders the promise an illegal undertaking under the federal statutes.*
>
> . . . .
>
> *Kosuga* thus contemplated that the defense of illegality would be entertained in a case such as this. If the purchased-coal agreement is illegal, it is precisely because the promised contributions are linked to purchased coal and are a penalty for dealing with producers not under contract with the UMW."

455 U.S. at 79, 82 (emphasis added).

Thus, the basic difference between *Kelly* and *Mullins* is that in *Kelly*, as in the cases here, the contractual obligation to make monetary payments sued upon was an "intelligible economic transaction in itself"—a simple agreement to pay for the purchase of goods or services—and the allegation that this obligation had been imposed by means of an external antitrust violation could not prevent its enforcement. In contrast, the obligation to make payments sued upon in *Mullins* was the central feature of the alleged antitrust violation, the cutting edge of a group boycott that potentially inflicted injury on third parties.

The court below recognized this critical distinction between the promise sued upon in *Mullins*, which in itself violated the antitrust laws, and the promise sued upon by respondents in these cases, which at most was the result of an antitrust violation.[5] The cases relied upon by petitioners are to the same effect.[6]

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[5] "In *Mullins*, the promise to contribute to the health and retirement funds in proportion to defendant's purchases of non-union coal . . . *on its face* embraced the very restraint of trade that the defendant alleged violated the Sherman Act. . . . Unlike the 'illegal promise' in *Mullins*, the promises to pay franchise fees in this case . . . appear rather to be a consideration for goods and services, to be paid for on an installment basis. . . ." App. A at 22a-23a (emphasis in original). The distinction is particularly clear in the case of the Gatlinburg lease. As the court of appeals pointed out, to hold that petitioners' obligation to pay rent under the lease gives rise to an antitrust defense "would lead to the absurd result that all leases violate the antitrust laws." App. A at 24a. Petitioners' challenge to the lease thus depends on their allegation that they were coerced into leasing the figures as part of a larger conspiracy to monopolize the wax museum display figures market, just as the defendant in *Kelly* alleged that he was coerced into purchasing onions from the plaintiff as part of a larger conspiracy to fix prices in the onion market. But, as this Court held in *Kelly* and confirmed in *Mullins*, such an external or collateral antitrust violation cannot be raised as a defense to the contract claim. App. A at 24a-25a.

[6] In the antitrust cases cited in the Petition at 13-14 n.13, the courts refused to enforce contracts that in and of themselves constituted antitrust violations. *Sola Elec. Co.* v. *Jefferson Elec. Co.*,

Petitioners claim, however, that the franchise and lease contracts are illegal—and therefore subject to an antitrust defense—because they require the payment of an "excessive" price for the goods and services received. Petition at 5. But were that view accepted, the rule that an antitrust defense will be permitted only when enforcement of a contract might lend the aid of the court to enforcement of the antitrust violation itself would be swallowed by the exception. Any purchaser of a product or service who later decided that he had made an improvident bargain (or who for whatever reason preferred not to pay) could resist the seller's action for the price by asserting that the contract of sale had been imposed by means of some illegal exercise of market power by the seller and that the agreed-upon price reflected, to some degree, the seller's alleged market power. As the district court pointed out, to extend *Mullins* in that fashion "would be potentially to embroil the antitrust laws in every suit to collect payment for goods and services." App. B at 48a. Nothing in this Court's decisions suggests such an expansive application of the antitrust defense to contract claims.[7]

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317 U.S. 173 (1942) (price-fixing provision in patent license agreement); *McMullen* v. *Hoffman*, 174 U.S. 639 (1899) (agreement to eliminate competition in bidding for public works contract); *Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.*, 307 F.2d 207 (3rd Cir. 1962), *cert. denied*, 372 U.S. 929 (1963) (market allocation agreement); *Kogod* v. *Stanley Co. of America*, 186 F.2d 763 (D.C. Cir. 1950) (contract to eliminate competition between theatre operators); *United States* v. *Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955) (market allocation agreement).

[7] For the same reason, petitioners' assertion that the court of appeals improperly substituted its own policy considerations for the antitrust laws (Petition at 13-14) is off the mark. The portion of the court of appeals' decision cited by petitioners simply reflects the policy considerations that underlie the existing rule established by *Kelly* and *Mullins*: that an antitrust defense is not and should not be permitted where the alleged antitrust violation does not appear with reasonable clarity from the very contract—indeed the particular contractual provision—upon which suit is brought.

Petitioners are not the first ones to urge such an unduly broad reading of the *Kelly-Mullins* rule. In *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 729 (1983), the Fifth Circuit rejected an antitrust defense to a contract claim in circumstances virtually identical to those presented here. In an argument that echoes petitioners' assertions, the defendant in *Avondale* claimed that it was entitled to raise an antitrust defense to a suit for payments due under a contract because the contract embodied an illegal tying arrangement and therefore was "intrinsically illegal." 677 F.2d at 1058. After tracing this Court's development of the antitrust illegality defense and concluding that "[t]he restrictive *Kelly* approach was reinforced in [*Mullins*]," the court of appeals held that since the plaintiff was not suing to enforce the alleged tie-in by requiring defendant to accept the allegedly tied product, an antitrust defense was not available against the plaintiff's claim for payments due under the contract. *Id.* at 1059-60.

The defendant in *Avondale* sought relief in this Court, arguing as do petitioners that *Mullins* permits the assertion of an antitrust defense in an action to compel payments for an allegedly tied product. 51 U.S.L.W. 3485-86 (U.S. Jan. 4, 1983). Indeed, the defendant contended that the Fifth Circuit's decision so clearly conflicted with *Mullins* that summary reversal was appropriate. *Id.* at 3486. This Court denied the petition. 103 S.Ct. 729. The same result is warranted here.

II. The Court of Appeals' Dismissal of Petitioners' Tying Claims Is Consistent With Applicable Decisions of This Court and Other Circuits

Petitioners' challenge to the dismissal of their tying claims on statute of limitations grounds is premised on a conflict among the circuits that does not exist. All three courts of appeals that have considered the question have

held that the mere collection of payments within the limitations period under a prelimitations contract allegedly imposed by means of an illegal tie-in is not sufficient to overcome the statutory bar set forth in 15 U.S.C. § 15b. App. A at 17a; *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d at 1055-56 (plaintiff's demand for payment under alleged tie-in contract may have resulted in pecuniary injury to defendant but did not constitute injury to competition giving rise to an antitrust cause of action within the limitations period); *Aurora Enterprises, Inc.* v. *National Broadcasting Co.*, 688 F.2d 689, 694 (9th Cir. 1982) (receipt of profits under prelimitations contract allegedly imposed by means of tying arrangement "is not enough to restart the statute of limitations").[8]

These decisions are fully consistent with, and indeed mandated by, the requirements of Sections 4 and 4B of the Clayton Act, 15 U.S.C. §§ 15 and 15b, and decisions of this Court concerning the time in which an antitrust action must be brought. Clayton Act § 4b requires that an antitrust suit be filed within four years after the cause of action accrued. App. D at 68a. Clayton Act § 4 provides that an antitrust cause of action accrues when (1) a person suffers injury to business or property caused by (2) conduct in violation of the antitrust laws. App. D at 66a. This Court has made clear that while

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[8] *See also, Electroglas, Inc.* v. *Dynatex Corp.*, 497 F.Supp. 97, 104-106 (N.D. Cal. 1980) (defendant's collection of installment payments for allegedly tied product sold to plaintiff more than four years before suit did not constitute an antitrust violation within the limitations period); *Bass* v. *Boston Five Cent Savings Bank*, 478 F.Supp. 741, 747 (D. Mass. 1979) (claim challenging prelimitations mortgage agreements as illegal tying arrangements held time-barred notwithstanding defendant's collection of mortgage payments within limitations period); *Landon* v. *Twentieth Century-Fox Film Corp.*, 384 F.Supp. 450, 458 (S.D.N.Y. 1974) (claim challenging prelimitations copyright license agreement as illegal tying arrangement held time-barred notwithstanding defendant's receipt of license payments within four years of the lawsuit).

both of these elements are necessary to maintain an antitrust suit, it is the second element—the antitrust violation—that determines the commencement of the limitations period. Consequently, an action challenging illegal conduct occurring more than four years before suit is filed will be barred unless the plaintiff demonstrates not only an injury within the limitations period but also that the injury resulted from the persistence or reoccurrence of the illegal conduct within four years of suit. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (holding that "each time a plaintiff is *injured* by *an act* of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, *the statute of limitations runs from the commission of the act*") (emphasis added); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968) (holding that conduct beginning more than four years before suit could be challenged where it constituted "a continuing violation of the Sherman Act *and* . . . inflicted continuing and accumulating harm") (emphasis added).[9]

It necessarily follows from these decisions that "the harm that creates the new cause of action [within the limitations period] must be '*antitrust* harm, *i.e.*, a continuing injury to *competition*, not merely a continuing pecuniary injury to a plaintiff.' *Electroglas, Inc.* v. *Dynatex Corporation*, 497 F.Supp. 97, 105 (N.D. Cal. 1980) (emphasis in original)." *Kaiser Aluminum & Chemical*

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[9] *Zenith Radio* created an exception in cases where the conduct that violates the antitrust laws results in future damages the accrual of which is speculative or the amount and nature unprovable until some time within four years of the commencement of suit. 401 U.S. at 339-40. In such cases the suit will be considered timely even though only injury to the plaintiff, not an antitrust violation, occurs within the four-year limitations period. In the present cases, the district court held that this exception was not applicable, App. B at 59a-60a, and petitioners did not challenge that holding in the court of appeals or in this Court.

Sales, Inc. v. *Avondale Shipyards, Inc.*, 677 F.2d at 1055. In the case of tying arrangements, the antitrust harm occurs when the tied product is forced on the purchaser, thereby foreclosing competition in the market for the tied product. *Jefferson Parish Hospital District No. 2* v. *Hyde*, 104 S.Ct. 1551, 1558-59 (1984). While the pecuniary injury to the purchaser may persist by reason of its payments for the tied product within the limitations period, that injury alone does not give rise to a cause of action independent of the original tying violation. *Avondale*, 677 F.2d at 1055-56; *Aurora Enterprises, Inc.* v. *National Broadcasting Co.*, 688 F.2d at 693-94.

The decisions of the Third and Seventh Circuits cited by petitioners (Petition at 17), although they did not involve tying arrangements, are in accord with the District of Columbia, Fifth and Ninth Circuits that the critical element in determining the timeliness of an antitrust suit is the conduct of the defendant that allegedly violates the antitrust laws, not the injury to plaintiff resulting from that conduct. Thus, in *Harold Friedman, Inc.* v. *Thorofare Markets, Inc.*, 587 F.2d 127, 139 (3rd Cir. 1978), the court held that the plaintiff's suit to challenge an exclusivity provision in a prelimitations lease agreement between the plaintiff's competitor and a shopping center was timely in view of the competitor's invocation of the exclusivity provision within four years of suit to prevent the extension of the plaintiff's lease.[10] Similarly, in *Baker* v. *F & F Investment*, 420 F.2d 1191, 1200 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970), a case involving an alleged price fixing conspiracy, the Seventh Circuit held that in determining the date on which the limitations period begins to run, "the touchstone of our

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[10] The court also held that the plaintiff's claim came within the "speculative damages" exception established by *Zenith Radio*. 587 F.2d at 138-39.

inquiry must be the nature and extent of defendants' behavior, not the duration of plaintiff's injury."

The only case arguably contrary to this consistent line of authorities is *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian*, 549 F.2d 1029 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977), in which the court held that the defendants' collection of quarterly rent and increases in the rent charged under recreational facility leases allegedly tied to the sale of condominiums to the plaintiffs constituted separate antitrust violations within the limitations period that injured the plaintiffs and upon which they could bring suit. As petitioners acknowledge, however, the Fifth Circuit essentially has limited *Mangurian* to its facts by holding that the rationale of *Mangurian* applies only in cases involving speculative or unprovable damages. *Avondale*, 677 F.2d at 1052-53; *City of El Paso* v. *Darbyshire Steel Co.*, 575 F.2d 521, 523 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979). This limitation is not surprising, for as one court pointed out in rejecting *Mangurian*, "[f]ollowed literally, [the *Mangurian*] theory would render the Clayton Act statute of limitations virtually inoperative in all cases involving relatively long-term contracts." *Electroglas, Inc.* v. *Dynatex Corp.*, 497 F. Supp. at 105. *See also, Aurora Enterprises, Inc.* v. *National Broadcasting Co.*, 688 F.2d at 694.[11]

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[11] In any event, *Mangurian* is distinguishable from the present cases as well as the other cases discussed above. In addition to the fact that the right of the defendants in *Mangurian* unilaterally to increase the amount of rent rendered future damages speculative at the time the lease agreements were executed, the alleged tying arrangement in *Mangurian* involved not only continuing payments but continuing purchases of the tied product. As long as the plaintiffs were required to lease recreational facilities from the defendants, competition in the provision of such facilities was foreclosed. In the present cases, by contrast, competition in the provision of wax museum start-up services was foreclosed, if at all, only when the franchise agreements were entered into and the museums were established.

Faced with the absence of any true conflict among the lower courts on this issue, petitioners attempt to create one by comparing the decision below to a line of authorities holding that the damages resulting from an illegal tying arrangement are the amount by which the price charged for the tied product or service exceeds its fair market value. Petition at 19-20. But those authorities are as irrelevant as they are irrefutable. The measure of damages in tying cases never was in issue in the rulings below, and the court of appeals recognized that the damages resulting from the alleged tie-in would be "the amount that the agreed prices exceeded the fair value of the goods and services received and consumed—the portion of the prices that could be traced to the illegal practice." App. A at 23a. The important point is that those damages are the result of the alleged antitrust violation, not the violation itself. As the decisions discussed above make clear, it is the violation that is the determinative factor for statute of limitations purposes.

Thus, there is no inconsistency between the cases relied upon by petitioners, which simply define the measure of damages resulting from a tying violation, and the statute of limitations cases, which hold that a cause of action accrues at the time a tying violation occurs, not when the damages from such a violation are suffered. With the possible exception of the discredited *Mangurian* decision, petitioners' equation of the elements of violation and damage is not supported by any authority. The Court need not grant certiorari to consider an issue on which the circuits are unanimous and fully in accord with the decisions of this Court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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No. 83-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C.M. UBERMAN ENTERPRISES, INC., *et al.*,
Petitioners,

v.

HISTORIC FIGURES, INC., *et al.*,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE COURT OF APPEALS' DECISION ON THE ILLEGALITY DEFENSE CANNOT BE RECONCILED WITH THE PRIOR CASES, INCLUDING THIS COURT'S DECISION IN *MULLINS* 1

II. THE APPELLATE COURT DECISION UPHOLDING THE STATUTE OF LIMITATIONS DEFENSE CONFLICTS WITH TWO LINES OF CASES: THE SUBSTANTIVE TIE-IN CASES AND THE CONTINUING BENEFITS CASES 5

A. The Court Should Grant Certiorari To Reverse The Erroneous Distinction Between "Pecuniary" Harm And "Antitrust" Harm..... 6

B. The Court Should Grant Certiorari To Resolve The Conflict Among The Circuits 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES:	Page
Aurora Enterprises, Inc. v. National Broadcasting Co., 688 F.2d 689 (9th Cir. 1982)	7
Baker v. F&F Investment, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970)	8
City of El Paso v. Darbyshire Steel Co., 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979)	8
Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909)	3
Hanover Shoe, Inc. v. United Shoe Machinery, 392 U.S. 481 (1968)	6
Harold Friedman Inc. v. Thorofare Markets Inc., 587 F.2d 127 (3d Cir. 1978)	8
Imperial Point Colonnades Condominium, Inc. v. Mangurian, 549 F.2d 1029 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977)	7, 8
Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551 (1984)	6, 7
Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983)	4, 8
Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1962)	2, 4
Kelly v. Kosuga, 358 U.S. 516 (1959)	3
National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967)	2
Reiter v. Sonotone Corp., 442 U.S. 330 (1979)	7
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)	6

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Court of Appeals' decision in this case departs from two fundamental policies of federal law: First, the decision would depart from the heretofore uniform principle that wrongdoers may not use federal courts to secure the fruits of their unlawful conduct; second, the decision would prevent a buyer who is the victim of an illegal tie-in from pursuing its statutory remedies on the erroneous ground that the prohibition against tie-ins was not intended to protect the buyer from "pecuniary" injury. In their Brief in Opposition, Respondents have not addressed the fundamental policy issues, and their arguments in defense of the Court of Appeals' decision simply highlight the confusion in the area and the need for Supreme Court review.

I. THE COURT OF APPEALS' DECISION ON THE ILLEGALITY DEFENSE CANNOT BE RECONCILED WITH THE PRIOR CASES, INCLUDING THIS COURT'S DECISION IN *MULLINS*.

In the Petition, we urged the Court to grant certiorari to reaffirm the long-standing principle that federal courts

do not aid wrongdoers to secure the fruits of their unlawful conduct and to remove the uncertainty about the contours of that principle.

Respondents have not challenged the importance of that principle in their Opposition. They have, instead, rested their defense of the Court of Appeals' decision entirely on the assertion that "[t]here is nothing unlawful about the contracts themselves . . . . Rather the antitrust illegality claimed by petitioners is entirely external to the contracts." Opp. at 5. This assertion is unsound and is inconsistent with prior decisions of this Court.

Like the Court of Appeals, Respondents attempt to distinguish contracts that courts will enforce from those that courts will not enforce by using terms like "external" and "intelligible transaction," but nowhere do they state precisely what those terms means. They appear to believe that the test is whether a contract sought to be enforced is illegal "on its face." *See* Opp. at 9 n.5 and 10 n.7; App. A at 23a. But that test would require federal courts to enforce countless illegal contracts so long as they were cleverly drafted to disguise their unlawful features, and it cannot be reconciled with this Court's decisions in *Kaiser Steel Corp v. Mullins*, 455 U.S. 72 (1982)[1]

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[1] In *Mullins*, this Court remanded the case for proceedings to determine whether the contract sought to be enforced violated Section 8(e) of the NLRA, even though that question could not be answered from the face of the agreement but rather required an analysis of "all the surrounding circumstances." *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 644-45 (1967); *see* 455 U.S. at 79, 82-86.

The Court in *Mullins* also rejected the argument that the illegality defense applies only if the promises sought to be enforced are unlawful "in themselves." The Court reasoned that the petitioner there "did not make a naked promise to pay money" and that the enforceability of the promise depended upon the context in which it was made. 455 U.S. at 79; *see* Petition at 9.

and *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909).[2]

The question of which agreements may be enforced when the dealings between the parties have been tainted by illegality is an important one which should be answered. The correct distinction is this: A contract is "external" or "collateral" to the violation—and may therefore be enforced—only when the contract and its enforcement are irrelevant to the violation of law. Thus, for example, in *Kelly v. Kosuga*, 358 U.S. 516 (1959), the Court enforced an agreement to purchase onions even though the parties had made a separate, illegal agreement to withhold goods from the market. That agreement, the so-called "nondelivery agreement," would have been illegal even if there had been no sale agreement, and enforcement of the sale agreement in no way furthered the illegal scheme.

In this case, in contrast, Respondents seek to enforce Petitioners' promise to buy franchise services. That promise was illegally tied to the sale of display figures. Without that promise, there would be no violation of federal law; indeed, the very purpose of the unlawful tie-in arrangement was to require Petitioners to buy franchise services and the illegality tainted the terms on which they agreed to do so. Enforcing the tied agreement thus would not only enable Respondents to reap the fruits of their illegal scheme, but also would put the Court in the position of aiding in the consummation of a violation of federal law.[3]

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[2] In *Continental Wall*, the Court sustained the illegality defense to a contract for the purchase of goods on the ground that the contract, although not illegal on its face, *"was intended to be based upon agreements that were and are essential parts of an illegal scheme."* 212 U.S. at 261 (emphasis in the original). The Court held that the agreement was not a "collateral, independent contract." *Id.*

[3] Respondents' inability to understand the distinction between this case and *Kelly* is reflected also in their erroneous assertion

By the same token, the lease agreement cannot properly be enforced in this case. Petitioners have alleged, and this Court should assume, that that agreement is the very means used by Respondents to perpetuate their monopoly and that the lease payments are fruits of their illegal scheme to monopolize the display figures market. The lease agreement cannot reasonably be said to be "collateral" or "external" to the alleged violation.[4]

In short, the flaw in both the Court of Appeals' decision and Respondents' defense of it is their failure to recognize that the violation of law and the contracts sought to be enforced in this case are inextricably intertwined. This same flaw is reflected in Respondents' heavy and mistaken reliance on the Fifth Circuit's decision in *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983). In that case, the plaintiff sought to enforce the changes provision of a construction contract; the defendant argued that that provision was

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that a reversal of the Court of Appeals in this case would permit an antitrust defense to be raised "in every suit to collect payment for goods and services" (Opp. at 10). To the contrary, reversing the Court of Appeals' decision would not render all contracts unenforceable, nor would it abolish the distinction between unenforceable contracts and those that are "collateral" or "external" to the violation of law. It would simply end the confusion about the distinction by making clear that the illegality defense is available where, as here, the contract sought to be enforced is a necessary element in the violation of federal law.

[4] The Court of Appeals' decision not only misunderstands the relationship between the contracts and the violation of law, but also is internally inconsistent. When focusing on the tying arrangement, the Court of Appeals attempted to distinguish *Mullins* by arguing that *Mullins* applies where the promise sought to be enforced is the *means* of enforcing an illegal restraint. App. A at 23a. In discussing the illegal lease agreement, however, the Court overlooked that distinction and held that Petitioners could not defend against enforcement of the lease even on the ground that it is an illegal *means* of perpetuating and enforcing Respondents' monopoly. App. A at 24a-25a.

part of a contractual arrangement in which the plaintiff had illegally tied its sale of insulation spray to the buyer's purchase of an aluminum tank. The Court correctly rejected the illegality defense, noting that the changes provision had nothing to do with the violation—it was not illegal; it did not impose any illegal overcharges on the buyer; it was not extracted by coercion; and it was not the unlawful fruit of the illegal scheme. As the Court explained, the buyer "does *not* allege that [the seller] is requesting an *inflated price* for the [tying product] *nor* does [the buyer] allege that the [product] is a *tied item*." 677 F.2d at 1060 (emphasis added). Quite a different result is called for where, as here, the contract sought to be enforced is the illegally tied contract that imposes illegal overcharges on the buyer.

Respondents and the Court of Appeals are confused about the proper distinction between agreements that may not be enforced and agreements that are truly collateral or external to the violation of federal law. Their confusion undermines the heretofore unbroken principle that federal courts do not act in furtherance of violations of federal law or lend their aid to wrongdoers seeking to reap the fruits of such violations. This Court should grant certiorari to clarify this important area of federal law.

II. THE APPELLATE COURT DECISION UPHOLDING THE STATUTE OF LIMITATIONS DEFENSE CONFLICTS WITH TWO LINES OF CASES: THE SUBSTANTIVE TIE-IN CASES AND THE CONTINUING BENEFITS CASES.

In the Petition, we urged the Court to grant certiorari to clarify the rights of a buyer to pursue its antitrust remedies where a seller has continued to require payments pursuant to an illegal contract during the statutory period. Respondents' Opposition badly misreads

this Court's recent decision in *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984), and fails to reconcile the circuit court cases applying the statute of limitations to illegal executory contracts.

A. The Court Should Grant Certiorari To Reverse The Erroneous Distinction Between "Pecuniary" Harm And "Antitrust" Harm.

In their Opposition, Respondents assert that "the critical element in determining the timeliness of an antitrust suit is the conduct of the defendant . . . ."[5] But they do not deny that they took active steps to enforce the illegal contracts during the statutory period. Nor do Respondents take the position that an antitrust cause of action arises only when the illegal contract is entered into, for they concede—as they must—that any subsequent effort to enforce the agreement that impairs competition in the marketplace creates a new cause of action. Opp. at 13, 14, 15 n.11. *See, e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

Thus, Respondents' argument, like the Court of Appeals,' comes down to the proposition that their enforcement of the contracts during the statutory period imposed only "pecuniary" harm, and not "antitrust" harm, on Petitioners and thus did not create a cause of action. Opp. at 13. According to Respondents, the only antitrust harm imposed by illegal tie-ins is the foreclosure of competition in the tied product market. *Id.* at 14. But the case Respondents cite for that proposition, *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984), stands for the opposite proposition.

This Court explained in *Jefferson Parish* that the antitrust harm from an illegal tie-in includes extraction of an unlawful price from the buyer. Indeed, according

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[5] Opp. at 14; *see also id.* at 13, *quoting Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

to the Court, "the essential characteristic of an invalid tying arrangement" is that the purchaser is forced to buy a tied product that it either did not want or would have "preferred to purchase elsewhere on different terms." As a result, the buyer "is compelled to pay a higher price . . . ."[6] This excessive price is an element of the antitrust injury. *See generally Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Respondents' enforcement of the illegally tied contract and their extraction of illegal overcharges thereunder thus imposed antitrust injury on Petitioners during the statutory period. The effort of the Court of Appeals and Respondents to dismiss this injury as merely "pecuniary" injury of no interest to the antitrust laws is mistaken. This Court should grant certiorari to make clear that those who are required to pay excessive prices by illegal tying arrangements are entitled to their statutory remedies under the antitrust laws.

B. The Court Should Grant Certiorari To Resolve The Conflict Among The Circuits.

The Court should also grant certiorari to end the confusion in the lower courts as to the application of the statute of limitations to executory contracts. The cases are all over the lot. As explained in the Petition, the Court of Appeals' decision in this case and a recent decision of the Ninth Circuit[7] hold that continued enforcement of the obligation to make payments under such a contract does not give rise to a cause of action. The *Mangurian* case in the Fifth Circuit,[8] and a decision of

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[6] 104 S. Ct. at 1557 n.15. *See* Petition at 19 & n.18. In this respect, the Court's opinion in *Jefferson Parish* simply reiterated what the lower courts—including at least five circuit courts—have uniformly held for years. *See* Petition at 19-20 & n.19.

[7] *Aurora Enterprises, Inc. v. National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982).

[8] *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977).

the Third Circuit which followed it,[9] are to the contrary. Two other decisions of the Fifth Circuit would restrict *Mangurian* to instances in which the measure of damages for the violation would have been speculative at an earlier time—at least in those cases, unlike this case, in which the defendant takes no steps to enforce the contract during the statutory period.[10] Yet the *Baker* case in the Seventh Circuit holds flatly that antitrust claims continue to accrue so long as the buyer makes, and the seller takes, payments under an unlawful contract.[11]

Respondents' attempt to reconcile the cases simply highlights the confusion. Respondents assert that all the cases are consistent because they adhere to the principle that the timeliness of the suit is determined by "the nature and extent" of defendant's conduct. Opp. at 14-15. Respondents' conduct in this case, however, was no different from the sellers' conduct in *Baker* and *Manguarian*: In all three cases, the sellers enforced the unlawful contracts during the limitations period by requiring the buyers to make the payments called for by the contracts. In *Baker* and *Mangurian*, the courts held that that was enough to enable the buyers to pursue their antitrust remedies, but the Court of Appeals in this case held the opposite. This Court should grant certiorari to resolve the conflict among the Circuits and to end the confusion in this important area of federal law.

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[9] *Harold Friedman Inc. v. Thorofare Markets Inc.*, 587 F.2d 127 (3d Cir. 1978).

[10] *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983); *City of El Paso v. Darbyshire Steel Co.*, 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979). In *Avondale* the court expressly recognized that filing of a suit to enforce an illegal contract creates a cause of action. 677 F.2d at 1055. In addition, as explained in the Petition, the distinction of *Mangurian* on the ground that the amount of future damages is speculative is equally available in this case. Petition at 18 n.16.

[11] *Baker v. F&F Investment*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970).

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, the writ should be granted.

Respectfully submitted,

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